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# ONTARIO LABOUR RELATIONS BOARD REPORTS



**January 1986**





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# ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1986] OLRB REP. JANUARY**

**EDITOR: NIMAL V. DISSANAYAKE**

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**2099-85-R** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Best Form Brassiere Canada Inc.**, Respondent

Certification Where Act Contravened - Practice and Procedure - Union seeking certification without vote based on employer unlawful conduct - Employer accepting facts alleged and agreeing contraventions will likely result in true employee wishes not being ascertained in vote - Board finding adequate support for union - Certifying union under s.8

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *H. Kobryn*.

**APPEARANCES:** *Eric del Junco* and *Al LeFort* for the complainant; no one for the respondent.

#### **DECISION OF THE BOARD;** January 21, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Cornwall, save and except foremen and foreladies, persons above the rank of foreman and forelady, clerical, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. The applicant has applied to be certified pursuant to the provisions of section 8 of the *Labour Relations Act*. Section 8 provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

5. The parties have agreed on the particulars filed in support of the section 8 application being accepted as facts before the Board. The parties have further agreed as follows:

"That the particulars disclose a contravention of the Act by the Employer of such nature that the true wishes of the employees are not likely to be ascertained."

6. Having regard to the representations of counsel for the applicant, the Board further finds that, irrespective of the applicant's challenges to the "list", the applicant has membership support adequate for collective bargaining.

7. Pursuant to its discretion under section 8 and section 6(2), therefore, the Board

certifies the applicant on an interim basis as exclusive bargaining agent for all employees of the respondent at Cornwall, save and except foremen and foreladies, persons above the rank of foreman and forelady, clerical, office and sales staff.

8. Should the parties be unable to resolve the challenges to the list, the Board is prepared to appoint a labour relations officer to inquire into the matter.

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**1672-85-R** Allan Berdan et al, Applicants, v. Canadian Brotherhood Railway, Transport and General Workers, Respondent, v. **Bill Thompson Transport Limited**, Intervener.

**Constitutional Law - Practice and Procedure - Termination - Certification for employees of employer engaged in truck hauling business obtained by waiver of hearings - Constitutional issue not raised or considered at certification - Board faced with termination application finding employer within federal jurisdiction - No jurisdiction to entertain termination application - Reconsideration application appropriate means to raise constitutionality of certificates issued**

**BEFORE:** *Thomas S. Kuttner*, Vice-Chairman, and Board Members *F. Burnet* and *C. A. Ballentine*.

**APPEARANCES:** *Cindy Watson* for the applicants; no one for the respondent; *C. E. Humphrey* for the intervener.

#### **DECISION OF THE BOARD;** January 10, 1986

1. The name of the respondent herein is amended to read: "Canadian Brotherhood Railway, Transport and General Workers".

2. This is an application brought pursuant to the provisions of section 57(2) of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. At the hearing of this matter, after entertaining the submissions of counsel on the question, the Board declared orally, for reasons to follow, that it lacked jurisdiction to consider this application given the nature and character of the employer's enterprise. On the evidence it is an undertaking "connecting the Province with any other or other of the Provinces, or extending beyond the Limits of the Province", and hence one with respect to which exclusive legislative jurisdiction has been conferred upon the federal Parliament by the combined operation of section 92(10)(a) and section 91(29) of the *Constitution Act, 1867*. The reasons for the Board's determination are herein included.

3. As always, with such questions of jurisdiction, the outcome must be determined by the application of the relevant legal and constitutional principles to what both Labour Boards and Courts sometimes term the "constitutional facts" underlying the dispute. See *Re Ottawa Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al* (1984) 44 O.R. (2d) 560 (C.A.). As to the fundamental legal and constitutional principles

governing, these may be simply and briefly stated. First, that exclusive provincial competence over labour relations is the rule, these being but an aspect of property and civil rights reserved to the provincial Legislatures by section 92(13) of the *Constitution Act, 1867*; second, that Parliament may nevertheless exercise exclusive jurisdiction over labour relations where such jurisdiction is an integral part of its primary competence over another subject reserved to it by the *Constitution Act, 1867*; third, that where it is shown that the regulation of labour relations is an integral part of the operation of an undertaking service or a business which itself is a federal one, then these are removed from provincial jurisdiction and rendered immune from the effect of provincial law; fourth, that the federal status of an undertaking service or a business depends on the nature of its operation; and fifth, that regard must be had to the normal or habitual activities of the undertaking, service or business rather than to exceptional or casual factors, in order to determine the nature of the operation. See the articulation by Mr. Justice Beetz of these fundamental principles together with references to the relevant authorities in *Montcalm Construction Inc. v. Minimum Wage Commission et al* (1978) 93 D.L.R. (3d) 641 at pp. 652-3; [1979] 1 S.C.R. 754 at pp. 768-9.

5. What are the constitutional facts here established to which the above enumerated principles are to be applied? They are somewhat minimal, although sufficient for our purposes, and this because of the manner in which the issue was raised and put before the Board. First it should be noted that the respondent chose not to enter an appearance or participate in these proceedings. Rather, it was content to advise the Board by letter dated October 30, 1985 under the hand of its representative, R. J. Stevens, that having reviewed a letter forwarded earlier to the Board by counsel for the intervener and dated October 22, 1985 in which it was submitted that the Board had no jurisdiction to deal with this matter, the respondent was of the view that the representations there made “are to our knowledge correct for the most part” and further, that the respondent “does not oppose the argument which is presented in that letter”. There, it was baldly submitted first that the respondent “is a federal work and undertaking”, and second, that the employees affected by this application “are employed in the federal work and undertaking”.

6. Moreover, counsel for the applicant concurred in the elaboration of constitutional facts given by counsel for the intervener in support of his submission that the Board lacked jurisdiction to entertain this application. Indeed, she declined to make any representation whatsoever on that submission, being content to allow the Board to make its determination on the basis of the constitutional facts as so presented and on the argument contesting jurisdiction as made. In these circumstances, the Board is inclined to consider the matter before it as one based on an agreed statement of fact upon which a ruling is sought. There can, of course, be neither conferral nor denial of jurisdiction in the constitutional sense by consent of the parties, and as close as the circumstances of this case approach a common consensus of the parties on the issue of jurisdiction, it is nevertheless incumbent upon the Board to make a determination on the basis of the facts before it.

7. The intervener, formerly known as “Thompson Transport Limited”, is a trucking company engaged in the haulage of general freight and auto parts in both the domestic and international markets. Approximately 70% of the business of Bill Thompson Transport consists of the continuous and regular haulage of such goods to and from points situate in the United States. Prior to December 1982, the business of Bill Thompson Transport was limited exclusively to the haulage of goods on the domestic market, (although it is not clear whether solely to and from points within the province of Ontario), such business which it had on the



international market being contracted out to other trucking firms. However, in that month, with the issuance by Transport Canada to the respondent of a licence to haul goods on the international market, it commenced to carry on this business itself, and as noted, continues to do so on a regular basis.

8. These facts may be sparse in detail but they are sufficient for us to conclude that beyond doubt Bill Thompson Transport is carrying on a single and unified truck hauling business which constitutes an undertaking "extending beyond the Limits of the Province". The combined effects of section 92(10)(a) and 91(29) of the *Constitution Act, 1867* dictate that that undertaking falls within the exclusive legislative jurisdiction of the federal Parliament. Hence employees engaged in the undertaking are subject not to our Act but rather to the *Canada Labour Code*, R.S.C. 1970, c. L-1. See *R. v. Toronto Magistrates, ex p. Tank Truck Transport Ltd.*, [1960] O.R. 497, 25 D.L.R. (2d) 161, aff'd. [1963] 1 O.R. 272; and *R. v. Cooksville Magistrate's Court, ex p. Liquid Cargo Lines Ltd.* [1965] 1 O.R. 84, 46 D.L.R. (2d) 700. It follows that the regulation of the labour relations between Bill Thompson Transport and its employees engaged in the undertaking are subject not to our Act but rather to the *Canada Labour Code*, R.S.C. 1970, c. L-1. Indeed this is the view taken by the Canada Labour Relations Board which, as counsel has advised, sometime subsequent to the granting to the company of a licence to haul goods on the international market in December 1982, issued a certificate to the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers for a unit of driver/operators employed by the company.

9. That unit however is not the unit which is the subject of these proceedings. Rather, we are dealing with a unit of persons engaged as maintenance employees of Bill Thompson Transport who work out of its enterprise in St. Thomas. With respect to these employees, the Board did issue a certificate on October 5, 1983 to the Canadian Transportation Workers Union No. 188, National Council of Canadian Labour, (Board File No. 1343-83-R). It is important to note here that that was a 'waiver application', the parties having waived their right to a formal hearing of the matter and the Board issuing its certificate on the basis of the written materials filed. The constitutional issue was neither raised nor considered by the Board in that matter. Shortly after the issuance of that certificate, the parties entered into a collective agreement with an expiry date of October 31, 1985. It is common ground between the parties that the Canadian Brotherhood Railway, Transport and General Workers is, by reason of an amalgamation, the successor trade union to the Canadian Transportation Workers Union No. 188 National Council of Canadian Labour and possesses all the rights, privilege and duties of Local 188 both under the Act and the agreement.

10. The Board wishes to stress at this juncture that this is the first time that the issue of its jurisdiction in a constitutional sense to entertain applications with respect to Bill Thompson Transport has arisen. The application before us is one for the termination of bargaining rights first granted by a certificate issued by the Board in earlier proceedings and now rooted in the above-noted collective agreement. The narrow issue is whether or not the Board has jurisdiction in the constitutional sense to entertain this application and this application alone. We wish to underscore that this panel of the Board cannot in these proceedings consider in any way the question of the constitutional propriety of the issuance of that certificate in those earlier proceedings. The issue is one of some complexity, particularly given the doctrine of merger of the bargaining rights granted by a certificate into those which flow from a collective agreement subsequently entered into. Be that as it may, the entire matter of the constitutional validity of the certificate issued should more properly be brought before

the Board on an application for reconsideration under section 106(1) of the Act. In a similar vein, the issue of whether the Minister had authority to appoint a conciliation officer as he did at the request of the respondent on September 20, 1985 is not one which can be here determined. Any question with respect to the authority of the Minister to make such an appointment can only be determined by way of a section 107(1) reference. Thus the Board limits itself here to the narrow question put, namely whether it has the constitutional jurisdiction to entertain this application for termination of bargaining rights.

11. This case bears an amazing resemblance to that before the British Columbia Labour Relations Board in *Arrow Transfer Company Ltd. et al*, 74 CLLC 16,130. That was an application for reconsideration brought on by the employer in which it sought cancellation of a certificate previously issued by the Board to the Canadian Association of Industrial, Mechanical and Allied Workers, Local 1. There too a determination was made that the trucking operation was a federal undertaking and hence subject generally to exclusive legislative jurisdiction of Parliament. There too the unit in dispute was one comprised of maintenance employees engaged in the repair and maintenance of trucks and trailers operated by the employer, as is the case here. As the chairman of the Board there noted, notwithstanding the general finding that the business or operation in question is a federal undertaking, it remains to be determined whether the particular operation in which the employees are engaged is so integrated within the general undertaking as to share its constitutional character. See *Reference Re Industrial Relations And Disputes Investigation (Eastern Canada Stevedoring Company)* [1965] S.C.R. 529, [1955] 3 D.L.R. 721; *Letter Carriers Union of Canada v. CUPW et al* [1975] 1 S.C.R. 178, (1973) 40 D.L.R. (3d) 105.

12. Using that approach, we note here first that these are employees of Bill Thompson Transport who provide maintenance and repair services for trucks and trailers of the company engaged in the haulage of goods on the international market. This is the only maintenance and repair work in which these persons are engaged. Their services are not, for example, made available to members of the public at large. Rather, their entire work day consists in ensuring that the fleet of trucks and trailers which Bill Thompson Transport operates in its undertaking are mechanically fit and safe for road service. It is evident that the maintenance work engaged in by these employees of Bill Thompson Transport is an integral and vital part of its operation as a federal undertaking. It follows then that the labour relations of these maintenance employees must be subject to the provisions of the governing federal legislation, the *Canada Labour Code*, as is the case of the driver/operators employed by Bill Thompson Transport. See, in general, the *Arrow Transfer* case, *supra*, at p. 1079f.

13. Accordingly, the Board finds that it has no jurisdiction to entertain this application for termination of bargaining rights and it so declares.

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**1669-84-R** Labourers' International Union of North America, Local 1059, Applicant,  
v. **Brantco Construction**, Respondent

**Certification - Reconsideration - Employer not posting Board notice and not filing reply to construction certification application - Not entitled to seek reconsideration of certificates issued on grounds of lack of adequate notice to employees because of its own failure to post - Hearing convened to hear employee objections to certification**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** January 16, 1986

1. The applicant in this application for certification was certified pursuant to section 144(2) of the construction industry provisions of the *Labour Relations Act* by a decision of the Board dated October 19th, 1984. Two certificates were issued, one with respect to construction labourers employed by the respondent in the industrial, commercial and institutional ("ICI") sector of the construction industry in the Province of Ontario, and the other with respect to construction labourers employed by the respondent in all other sectors in the counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, the Board's geographic area #3. These certificates were issued without a hearing in accordance with the Board's discretion under section 102(14) of the Act. At the time the certificates issued, no reply had been received from the respondent. In addition, the applicant had informed the Board that its notice to employees of the application had not been posted at the employer's job site, which made it necessary for the Board to extend the terminal date set for the application and to serve notice on the individual employees known to be affected by the application.

2. The respondent acknowledged receipt of the Board's transmittal letter which accompanied its October 19, 1984 decision and certificates in a letter dated October 26th, 1984, which states:

We acknowledge receipt of your letter dated October 22, 1984.

We have no intention of entering into any agreement or certification with the Labourers' International Union of North America, Local 1059 whatsoever.

We would like to have the opportunity to argue our intentions.

We trust you will reply accordingly.

The Board's response to that letter crossed in the mails with a letter dated November 19, 1984, from the respondent's solicitors requesting the Board to reconsider its decision on the basis of the following information set out in the letter:

... As is apparent from the correspondence that our client has sent directly to you, our client is objecting to the issuance of a Certificate to the Labourers.

Our client has advised us that while he may have received the Application for Certification, he did not appreciate its importance and as a result did not post notices or make any attempt to reply. He also acknowledges that he received a telephone call from the Board, at which



time he advised the caller that he had no intention of signing any agreement with Labourers' Local 1059.

We have also been advised that on the date of the Application for Certification, September 24th, 1984, there were six construction labourers at work in the employ of Brantco Construction. Since notices were not posted, it would appear that four of these employees may not have received any notice of the Application for Certification. Consequently, their views on the matter were not considered, notwithstanding the fact that their interests were significantly affected.

On behalf of our client, we wished to bring this matter to the attention of the Board and would respectfully request that the Board's decision in this matter be reconsidered in light of this information.

3. The Board sent a copy of the letter from the respondent's solicitors to the applicant for its information and comments and, in turn, sent to the respondent's solicitors a copy of the applicant's response. There is no record in the Board's file of any further communication with the parties. Nor does the file contain any record that the Board decided the respondent's request to reconsider the decision certifying the applicant as bargaining agent for the respondent's construction labourers.

4. The Board is now in receipt of a letter dated December 18, 1985, from a person purporting to be an employee of the respondent. It was sent registered mail in an envelope postmarked January 2, 1986, and was received by the Board on January 3, 1986. Its text in major part states as follows:

I am writing to you on behalf of all the labourers employed by Brantco Construction.

Our company occasionally takes on a contract in the vicinity of London, Ontario. The last time we worked in that area was September, 1984, which was over 1 year ago. The location of the work was at Chi-Chi's Restaurant, Wellington Rd, London.

We were only just recently informed about an alleged certification of our company which may have occurred just shortly after the completion of this project.

In the event our company is in fact certified, we, being all the labourers currently employed by Brantco Construction, wish to advise you that we object to the certification and we ask that you reconsider your position and de-certify our company.

Please find below a petition against certification signed by all the labourers in our company. Note, some of the names on this list may be considered both labourer and machine operator.

...

5. With respect to the respondent's request, made through its solicitors, that the Board reconsider its decision of October 19, 1984, the Board regrets that it failed to decide the request. The Board's failure, notwithstanding the letter requesting reconsideration does not identify any grounds which would cause the Board to exercise its discretion under section 106(1) of the Act to reconsider and vary or revoke its decision. The grounds advanced in the letter are that there were some employees affected by the application who may not have received notice of it by reason of the respondent's failure to heed the Board's direction to post its notice. The respondent clearly is not empowered to act on behalf of any such employees in matters concerning their choice of or opposition to a trade union as their exclusive bargaining agent. Therefore, the respondent is not the proper party to raise an objection on their behalf. Had it come to the attention of the employees, by the time of the

respondent's request for reconsideration, that the Board had certified the applicant without them having received proper notice of the application, it would have been up to them to challenge the Board's decision certifying the applicant. There was no communication of any sort from employees either at the time the respondent's request was received or during the exchange of correspondence between the Board and the parties respecting that request.

6. Thus, at that time, all the Board had before it was the respondent's allegation that some employees may not have received notice of the application. That alleged lack of notice was entirely due to the respondent's own failure to comply with the Board's instructions to post its notice and file a reply and list of employees. Moreover, by means of the Form 81 - Reply to Application for Certification, Construction Industry, the respondent had the opportunity to make representations or raise objections to the application. Paragraph 14 of the form makes specific provision for the respondent to request a hearing and put forward those matters on which it wishes to be heard. For reasons known only to the respondent, it chose not to file a reply.

7. These circumstances do not constitute the kind of exceptional circumstances which, having regard to the need for finality to the Board's proceedings, would cause it to exercise its discretion under section 106(1) of the Act to reconsider a decision made after the parties have been given the opportunity to make their representations to the Board. In this respect see the Board's decision in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320, cited with approval in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185. In short, the respondent has not alleged any matters which, with due diligence, could not have been filed with the Board prior to issuance of its October 19, 1984 decision. Therefore, on the basis of the respondent's request contained in the November 19, 1984 letter from its solicitors, the Board is not prepared to reconsider, vary or revoke its decision or certificate dated October 19, 1984 pursuant to section 106(1) of the *Labour Relations Act*.

8. It remains for the Board to consider the letter dated December 18, 1985 from a person purporting to be an employee of the respondent and affected by the application for certification. He claims to be writing on behalf of nine other persons who are alleged to be labourers employed by the respondent at the time of writing. It is implicit in the letter that there may be employees who should have received notice of the application for certification and did not. In these circumstances, the Board considers it appropriate to list this matter for hearing for the purpose of receiving the evidence and representations of the parties respecting whether there were employees who were entitled to notice of this application for certification who did not receive notice and, if there were, what effect that should have on the certificates which have been issued to the applicant.

9. Accordingly, the Registrar is directed to list these matters for hearing and to serve notice in the Board's customary manner on the parties and the employees. The respondent is directed to post copies of this decision together with copies of the Board's Notice of Hearing in conspicuous places where they are most likely to come to the attention of all employees who may be affected by these matters. The copies of the decision and notice are to remain posted until the close of business on the day of hearing. The respondent is directed further to furnish to the Board forthwith the names of all construction labourers who were employed by the respondent as at September 24, 1984 and their addresses of record.

**2057-83-U; 2058-83-U; 2505-83-R; 2506-83-R** Canadian Union of Public Employees, Applicant, v. **Brantwood Manor Nursing Homes Limited**, Herb Hallatt and Marion Hallatt, Respondents; Canadian Union of Public Employees, Complainant, v. **Brantwood Manor Nursing Homes Limited**, Herb Hallatt, Marion Hallatt and Med+Experts Inc. Respondents; Canadian Union of Public Employees, Applicant, v. **Hallmark Housekeeping Services Inc.**, Med+Experts Inc. and **Brantwood Manor Nursing Homes Ltd.**, Respondents; Canadian Union of Public Employees, Applicant, v. **Hallmark Housekeeping Services Inc.** and **Med+Experts Inc.**, Respondents

**Duty to Bargain in Good Faith - Interference in Trade Unions - Related Employer - Remedies - Unfair Labour Practice - Nursing home contracting with outside agencies to perform house-keeping, laundry, maintenance, health care and nursing aide functions - Laying-off own employees - Whether unlawful - Whether home and outside agencies related employers - Whether bound by collective agreement - Whether control reserved by written contract relevant though not exercised - Reinstatement and backwages directed as remedy on related employer declaration - Failure to bargain with negotiating committee because of its composition unlawful**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *J. Wilson* and *S. Cooke*.

**APPEARANCES:** *Jim McDonald*, *Brian Sheehan*, *Gord Allen* and *Ken Hopper* for the applicant/complainant; *Ernest Rovet*, *Delaine Foster* and *Marion Hallatt* for Brantwood Manor Nursing Homes Limited, *Herb Hallatt* and *Marion Hallatt*; *Irving Kleiner*, *John O'Donoghue* and *Miguel Singer* for Med+Experts Inc.; no one appeared for Hallmark Housekeeping Services Inc.

**DECISION OF OWEN V. GRAY, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE;** January 31, 1986

1. Brantwood Manor Nursing Homes Limited ("Brantwood") owns and operates a nursing home and adjoining residential facility in Burlington, Ontario. Marion Hallatt is the administrator of the nursing home; she and her husband Herb are the sole shareholders of Brantwood. The Canadian Union of Public Employees ("CUPE" or "the union") is the exclusive bargaining agent for a bargaining unit defined in its collective agreement with Brantwood as:

all employees of Brantwood Manor Nursing Homes Limited at Burlington, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, supervisors, persons above the rank of supervisor, technical personnel, office staff and students employed during the school vacation period.

In the fall of 1983, Brantwood arranged for the performance by outside agencies of housekeeping, laundry, maintenance and health care aide/nurse aide functions hitherto performed by direct employees of Brantwood. Brantwood then laid off those direct employees, and took the position that its collective agreement with the union had no application to the persons supplied by outside agencies or to the work performed by them. In these four applications, the union challenges that view of the labour law consequences of these



arrangements and, further, asserts that in making those arrangements Brantwood has acted unlawfully.

2. The applications in Board Files 2057-83-U and 2058-83-U were filed on December 2, 1983. The former is an application under section 93 of the *Labour Relations Act* ("the Act") for a declaration that Brantwood's layoff of nursing, housekeeping and laundry staff constituted an unlawful lockout. The latter is a complaint under section 89 of the Act alleging that the arrangements made by Brantwood with outside agencies and the consequent layoffs constituted violations of a number of sections of the Act. The claim that Brantwood's actions constituted an unlawful lockout was not pursued in argument.

3. The other two applications before us were filed on February 3, 1984. The respondent Hallmark Housekeeping Services Inc. ("Hallmark") is the agency with which Brantwood contracted for the performance of work formerly performed by its own laundry, housekeeping and maintenance staff. Med+Experts Inc. is the agency with which Brantwood contracted in January, 1984, for the performance of work which until December, 1983, had been performed by health care aides and nurse aides employed by Brantwood. Med+Experts Inc. ("Med+Experts") was known as 537918 Ontario Limited when it entered into that contract. The title of each proceeding has been amended to reflect that respondent's change of name. In Board File No. 2505-83-R, CUPE applies under subsection 1(4) of the Act for a declaration that Brantwood, Hallmark and Med+Experts constitute one employer for purposes of the *Labour Relations Act* and for consequential relief, including a declaration that the two contractors have been bound by the terms of the existing collective agreement between CUPE and Brantwood since contracting with Brantwood. In Board File No. 2506-83-R, CUPE alleges that Brantwood's arrangements with Hallmark and Med+Experts constituted sales of parts of its business within the meaning of section 63 of the Act, and seeks a declaration that each of the respondents was, consequently, bound by the terms of the aforesaid collective agreement.

### History of Proceedings

4. The first two applications were scheduled for hearing December 9, 1983 and February 2 and 3, 1984, before a panel consisting of the then Alternate Chairman, Mr. Burkett, and Board Members Wilson and Cooke. On each occasion they were adjourned in response to the representations of the parties then involved. On April 5, 1984, all four applications came on for hearing before the original panel which then consolidated these four applications and commenced hearing evidence. The Board permitted the respondent Brantwood to have a verbatim reporter present. At the conclusion of that day, the hearing was adjourned for continuation on May 31 and June 5, 1984. Following Mr. Burkett's resignation from the Board, the parties agreed to the substitution for Mr. Burkett of another Vice-Chairman who, they further agreed, could rely on a transcript of the evidence heard April 5, 1984, as prepared by the verbatim reporter retained by Brantwood, and on any notes of that evidence which had been made by any of Messrs. Cooke, Wilson and Burkett. The parties further agreed that the hearing could proceed before the reconstituted panel without the necessity of repeating the evidence heard on April 5th. Accordingly, the hearing of these matters continued before this panel on May 31, June 5, July 9 and 11, September 24, 25, 26, 27 and 28, November 29 and 30, December 3, 4 and 5, 1984, and February 15, 1985.

5. By letter dated July 4, 1984, counsel for the union requested leave to amend its

complaints in the first two applications to include new allegations of misconduct said to have been committed by Brantwood at various times subsequent to the filing of these complaints. The Board granted leave to so amend those complaints at its hearing of July 9, 1984.

6. The hearing of oral evidence was completed December 3, 1984. The following day, the counsel for Brantwood and Med+Experts each completed their oral argument in chief, and counsel for the union completed his argument in chief and reply to the arguments in chief made on behalf of Brantwood and Med+Experts. Counsel for Brantwood and Med+Experts then requested the opportunity to deliver their reply to the union's argument in writing, rather than wait for a further hearing date. Counsel for the union expressed concern that such written submissions might exceed the bounds of proper reply. The Board nevertheless granted the respondents' request, observing that counsel for the union could himself make written submissions if, on receipt of those from the respondents, he felt they had exceeded proper bounds. The respondent's written submissions were filed December 28, 1984. By letter dated January 11, 1985, counsel for the union filed written submissions in reply to the respondents' written reply arguments. By letters dated January 18 and 25, 1985, counsel for Brantwood and Med+Experts both objected that the letter of January 11th exceeded the bounds contemplated when the Board authorized written submissions on December 4, 1984, and asked that the Board not consider the matters raised in that letter. The Board scheduled a hearing on February 15, 1985 to consider the matters raised by counsel for Brantwood and Med+Experts in their letters of January 18 and 25, 1985, but neither of them attended that hearing; only counsel for the union appeared. The Board then ruled that it would review the submissions set out in the letter of January 11, 1985 in the course of its deliberations.

7. By letter dated March 14, 1985, counsel for the union requested that the Board receive further evidence. The body of that letter sets out the basis of the request and the nature of the further evidence:

In Mr. Kleiner's reply argument of December 28, 1984 on behalf of Med+Experts, he stated, on page 2 of his argument, that "the Ministry of Health is and has been well aware of the contracting out arrangements that are now in place at Brantwood Manor Nursing Home". He went on to argue that no violations had been issued "by the Ministry of Health even after being fully informed of the contracting out arrangements in the facility".

We have recently received a copy of a letter from Mr. Keith Norton, then Minister of Health, to our client. In the letter which was sent after the hearing, Mr. Norton advised that Mrs. T. MacDonald, the Director of Nursing at Brantwood Manor, had indicated to inspectors from the Ministry of Health that she was responsible for the duties set out in section 60(1) of Regulation 690 to the *Nursing Homes Act*. Mrs. MacDonald also indicated that the Med+Experts' non-registered nurses' aides worked under the direction of a registered nurse, who was ultimately responsible to her.

We hereby seek leave of the Board to file a copy of that letter, which will be filed with the Board, should leave be granted. We are not requesting a hearing of the Board on this request but we will abide by the decision of the Board.

We have enclosed a copy of Mr. Norton's letter with the copies of this letter which have been delivered to Mr. Rovet and Mr. Kleiner.

Counsel for Med+Experts wrote to the Board opposing the request. This correspondence was then copied to all counsel, who were invited to make written submissions and instructed that the Board would deal with the matters raised on the basis of written submissions filed if none of the parties requested a further hearing. None did.

8. After reviewing the submissions filed, we concluded we would not grant the union leave to file Mr. Norton's letter. The extent to which Brantwood's director of nursing did or could exercise control and direction over staff nominally employed by Med+Experts was one of the central issues in these proceedings. None of the parties called Ms. McDonald as a witness, though there was no suggestion that she was unavailable or unable to testify. It is not said that Ms. McDonald's alleged statement was made only after the Board's hearings were concluded, nor that the applicant could not with due diligence have learned of it before the Board's hearings were complete. In any event, even if counsel's letter had disclosed any ground for reopening our hearing to receive the *viva voce* evidence either of Ms. McDonald or the unnamed inspectors, we would not have received Mr. Norton's letter in their place. Even if Ms. McDonald's alleged statements to the inspectors could be treated as admissions made on behalf of Brantwood by a member of its management, a proposition about which we need form no opinion, Mr. Norton's letter is itself double hearsay evidence of the admissions. While we are not bound by the rule which prevents reception by courts of (most) hearsay evidence, we are guided by the rationale for that rule, which recognizes the unfairness which can be caused by receiving unsworn evidence which cannot be tested by cross-examination. In the circumstances, we would not have been prepared to give the letter any weight as evidence of either the content or the truth of any statement allegedly made by Ms. McDonald to inspectors in the Ministry of Health. Assuming, without for this purpose deciding, the relevance to the issues before us of the extent to which the arrangement Brantwood and Med+Experts say exists between them complies with the *Nursing Homes Act*, we were not satisfied that any opinion Ministry of Health officials may have come to on the question had any independent relevance. Thus, even if we were to accept the doubtful logic in the proposition that the absence of the prosecution of Brantwood under the *Nursing Homes Act* is evidence of the Ministry's affirmative opinion that Brantwood's arrangement with Med+Experts complies with that Act, and if, further, we were to overlook the hearsay nature of behaviour as evidence of belief, the Ministry's belief so established would still be irrelevant unless it were also accurate. Accordingly, as the reply argument to which counsel argued Mr. Norton's letter would be responsive was not one to which we were prepared to accord any weight in disposing of the issues before us, the fact it had been made was not a persuasive ground for admission of the letter.

### Facts

9. Herb Hallatt was practising law in Hamilton in 1964 when the first and second mortgages on the Brantwood Manor Nursing Home went into default. The second mortgage was then held by Hallatt and a Hamilton business man. The first mortgagee was taking steps to realize on its security. Hallatt and his co-mortgagee refinanced the first mortgage and took over the property and its associated business. They invited a doctor client of Hallatt's to operate the facility in return for a one-third interest in the business. Hallatt's wife, Marion, took on the role of administrator of the facility. Hallatt bought his two partners out in 1966. He continued to practice law in Hamilton. Marion Hallatt continued to run the nursing home.

10. A new wing was added to Brantwood Manor in 1972, increasing the number of licensed nursing home beds from 60 to 129. The Hallatt's hired the then assistant administrator of a Hamilton Hospital to assist Mrs. Hallatt in the administration of the expanded facility. He became Brantwood's administrator when Mrs. Hallatt retired from that position in 1974.



Brantwood Manor underwent further expansion in 1980 with the addition of a four-floor residential wing. The Hallatt's thought that the demand for nursing home beds might lead the Ministry of Health to increase the number of beds for which Brantwood Manor was licensed. It did not. While 35 of Brantwood's 129 licensed beds are now located in the second floor of the new wing, the other three floors of that new wing are operated as part of a residential facility in which nursing care is not provided and which is not, therefore, regulated by the *Nursing Homes Act*.

11. In 1974, CUPE was certified as bargaining agent for all employees of Brantwood Manor, with certain exceptions. Those exceptions included registered nurses, ("R.N.'s") for whom the Ontario Nurses Association ("ONA") was later certified as bargaining agent. Because of the nature of its operations, Brantwood's collective bargaining with these unions was and is governed by the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1980, c. 205 ("the HLDAA"). That Act prohibits resort to strikes and lockouts at any stage of the parties' negotiations for a collective agreement. Instead, matters left unsettled by the parties' negotiations must be resolved by a process of binding arbitration.

12. The terms of the collective agreement between Brantwood and CUPE for the period July 1, 1981 to June 30, 1983 were determined by an arbitration award ("the Rubenstein award") released in April 30, 1982. As of June 30, 1981, hourly wage rates had been \$6.00 to \$6.40 for registered nurses' aides, \$5.55 to \$5.95 for nurses' aides, and \$5.25 to \$5.65 for housekeeping and laundry staff. The arbitration board unanimously awarded each classification four increases of 65 cents per hour each, effective July 1, 1981, January 1 and July 1, 1982 and January 1, 1983. In addition to the increase in prospective costs of operation, this created an immediate liability for retroactive wages in excess of \$100,000.00. ONA's agreement with Brantwood was also the subject of interest arbitration proceedings which culminated in an award ("the Ladd award") of retroactive and prospective wage increases in December, 1982. This created a further substantial current liability for Brantwood.

13. Increased labour costs and substantial new liabilities for retroactive wage increases were not Brantwood's only financial difficulties at the end of 1982. Brantwood's indebtedness had increased with the construction of its new facilities. A substantial portion of its debt financing consisted of bank loans on which interest was payable at current rates. Current interest rates had risen dramatically. Revenues, on the other hand, were almost entirely dependent on the nursing home rates set and partially paid by the Ministry of Health. Increases in these rates had not kept pace with increases in Brantwood's expenses.

14. In late 1982, the Hallatt's retained accountants to advise them with respect to Brantwood's financial condition. The accountants found that Brantwood was in serious financial difficulty. One of their observations was that administrative costs could be reduced if the salaried administrator and the assistant hired for him in 1982 were terminated and Mrs. Hallatt returned from retirement to active duty as the home's administrator. That was done in March 1983. The accountants also recommended that the Hallatt's sell the business. The Hallatt's gave that option some consideration, but for various reasons the business was not sold. They decided they would try to obtain a loan, to be secured by a new mortgage on Brantwood's property, in an amount sufficient to discharge all of its liabilities, including the existing mortgages, outstanding bank loans and retroactive wage liabilities. Mr. Hallatt approached National Trust, the existing first mortgagee, on this basis.

15. By the middle of 1983, the Hallatt's had been unable to arrange refinancing with



National Trust on terms the Hallatt's considered satisfactory. Brantwood's retroactive wage liability under the Rubinstein award remained unpaid. That had been the subject of various discussions and meetings with CUPE in the months following the award, and had become the subject of a grievance filed under the new collective agreement in September of 1982, on which further action stood deferred pending Brantwood's attempts to secure refinancing. The union finally referred that grievance to arbitration in February 1983. In an award dated March 20, 1983, a sole arbitrator appointed pursuant to section 45 of the *Labour Relations Act* concluded that she had jurisdiction to deal with what she found was a violation of the collective agreement put in place by the Rubinstein award, and ordered Brantwood to comply with that collective agreement by paying its retroactive wage liability together with interest thereon. That liability was discussed, but not paid, during the ensuing months. The agreement implemented by the Rubinstein award expired on June 30, 1983, but the *Inflation Restraint Act*, S.O. 1982, c. 55 required that its terms continue in place for a further period of one year, with a five percent increase in compensation rates. Brantwood did not implement that increase on July 1, 1983.

16. The retroactive wage liability under the Rubenstein award was a regular topic of conversation between Herb Hallatt and Gord Allan, the CUPE representative in charge of servicing this bargaining unit. In late July or early August, Hallatt told Allan his negotiations with National Trust had fallen apart. Allan told Hallatt he was having difficulty answering employee questions about Brantwood's delays in paying them their retroactive wage increases and implementing the July 1st increase under the *Inflation Restraint Act*. He invited Hallatt to speak to the employees directly to explain Brantwood's financial problems. Hallatt agreed, and a meeting was arranged for August 25, 1983 at 7:30 p.m. in Brantwood's activity room. Just before the meeting's scheduled starting time, Mr. and Mrs. Hallatt, Mr. Walters (the former administrator of Brantwood) and Mr. Marini, the Hallatts' lawyer, met with Mr. Allen and Mrs. Taylor, the local union president. Hallatt had certain financial statements in front of him which he invited Mr. Allan and Mrs. Taylor to consider. Allan did look at one of the statements. He saw that it was unaudited, and he observed to Hallatt that he, Allan, was not an auditor. Allan felt it would be inappropriate to delay Hallatt's meeting with the members who had assembled in the activity room, and he suggested that the meeting should start without further delay. It did.

17. As he had told Allan he would during their meeting in the office, Hallatt spoke to the assembled employees about Brantwood's financial difficulties and asked them to waive fifty per cent of the wage increase provided for in the Rubinstein award and all of the five per cent increase provided for by the *Inflation Restraint Act*. He spoke for 20 to 25 minutes and invited questions. Both he and Allan had expected that the employees would have a number of questions. To the surprise of both of them, there was only one question. After the Hallatt's and their solicitor left the meeting, the employees asked Allan a number of questions, the tenor of which suggested to him that they did not believe Hallatt. They rejected Hallatt's requests for concessions, and directed that Allan demand full implementation of the five per cent increase effective with the payroll due September 15, 1983. Allan wrote to Mr. Hallatt on August 26 with respect to the five per cent increase, and to Mrs. Hallatt on September 1, 1983, demanding immediate payment, with interest, of Brantwood's liability for retroactive wages.

18. Although the possibility of Brantwood's "contracting out" bargaining unit work had not been discussed with CUPE before it occurred, it had been considered by Mr. Walters, Brantwood's then administrator, during the months immediately following the release of the

Rubinstein award. Mr. Hallatt testified that he rejected “contracting out” when that was suggested by Walters at that time. Hallatt thought the financial problems were temporary; he was satisfied with the work the employees had been doing and did not want to “break up a winning team”. He said he did not give “contracting out” serious consideration until after he learned the employees had rejected the request for concessions which he had made of them at the meeting of August 25, 1983. Mrs. Hallatt, however, had begun investigating “contracting out” earlier in the month of August. She had spoken to the administrator of a home which had contracted out its housekeeping and laundry functions, and he had provided her with the names of Hallmark and C.S.L. Services Group (“CSL”). By the time Mr. Hallatt spoke to Brantwood’s employees on August 25th, Mrs. Hallatt had already met with a representative of C.S.L., who had undertaken to submit a detailed proposal. She had a similar meeting with a representative of Hallmark on August 31, 1983. Mr. Marini testified that Mr. Hallatt had been considering his legal right to contract out “on a peripheral basis” prior to the August 25th meeting.

19. On September 14, 1983, Hallmark submitted what its covering letter described as “a comprehensive proposal for the provision of full Housekeeping, Laundry, and Maintenance Services at Brantwood Manor Nursing Home & Residence.” Mrs. Hallatt met with a representative of C.S.L. at about the same time, but CSL did not present a proposal until September 29, 1983. CSL’s proposal covered “the provision of Dietary and Nursing aide labour as well as the management and labour for Housekeeping/Laundry & Maintenance Services at Brantwood Manor.” Mrs. Hallatt accepted the Hallmark proposal on Brantwood’s behalf. Although the contract between Hallmark and Brantwood bears the date of September 26, 1983, it was apparent from Mrs. Hallatt’s evidence that she had not signed it until she had had an opportunity to compare it with the C.S.L. proposal. She testified that she preferred the Hallmark proposal to that of C.S.L. because she did not feel at that time that it was either desirable or necessary to contract out the dietary and nurse aide functions. She did not want to disrupt the nursing home any more than necessary, and thought the savings to be gained by implementation of the Hallmark proposal would be a sufficient response to Brantwood’s financial problems. Very shortly after signing the Hallmark proposal, however, she apparently concluded these savings were not sufficient, and began considering contracting out the kitchen function. In October, 1983, Mrs. Hallatt solicited, received and analysed a proposal by Caterplan to take over that function, but concluded that implementation of that proposal would increase rather than reduce Brantwood’s total costs.

20. At some point in October or early November, Mrs. Hallatt read in the newspaper about a nursing home which had entered into a contract with Medox Health Care Services (“Medox”) with respect to nurse aides. She contacted the administrator of the home by telephone. He referred her to Thompson House, a home for the aged whose arrangements with Medox were later to become the subject of an arbitration decision to which reference was made in the argument of this case. As a result of contacting Thompson House, Mrs. Hallatt spoke to Paul Michaels, who was then a representative of Medox. She met with Mr. Michaels on November 7th to discuss the “contracting out” of nurse aide work. As a result of these discussions, in the second week of November Mr. Hallatt signed an agreement with Medox for the supply of health care aide/nurse aide services in the period December 15, 1983 to December 31, 1984.

21. On September 23, 1983, 18 housekeeping and laundry workers were given notice of indefinite layoff effective October 23, 1983. Some of these exercised their right to “bump”

more junior employees working in the kitchen. On November 24, 1983, 33 health care aides/nursing aide workers received notice of an indefinite layoff commencing at the end of their last shift on December 14th or, in 9 cases, at 7:15 a.m. on December 15th.

22. Apart from its term of operation (December 15, 1983 to December 31, 1984) and the hourly rate to be paid by Brantwood to Medox (\$6.25 per hour for the term of the agreement) for the contemplated services, the provisions of Brantwood's written agreement with Medox are identical to those of an agreement made at almost the same time between Medox and the Kennedy Lodge Nursing Home in Toronto. The health care aide/nursing aide workers at that nursing home were represented by another trade union, which responded to its announcement of the Medox agreement and consequential layoffs by filing an unfair labour practice complaint with this Board. As appears from the Board's decision in that complaint (*Kennedy Lodge Inc.*, *infra*), at some time before December 16, 1983, the date performance by Medox of its agreement with Kennedy Lodge was to begin, Medox, Kennedy Lodge and the trade union complainant in that case agreed that implementation of that agreement would be deferred until this Board had made a determination in the proceedings initiated by that trade union. The existence and eventual results of those proceedings have not been without significance for the parties to these proceedings. Here, however, there was no similar agreement to defer implementation of Brantwood's contract with Medox.

23. On December 9, 1983 the Hallatt's met with the chairman of Medox at its offices. He told them Medox would not follow through on the contract it had made. A discussion ensued, as a result of which Medox did agree to honour the contract for a period of one month while Brantwood sought a replacement firm. The Hallatts were not pleased with the Medox decision, nor was Paul Michaels, the Medox employee with whom the Hallatt's had been dealing. He recommended that they speak to Judy Bishop, who was president of Med-Care Health Services Limited in London. Judy Bishop is a graduate registered nurse with varied experience in nursing, teaching and consulting in the health care personnel field, and Med-Care Health Services Limited was then in the business of providing relief staff to long-term care institutions, staffing retirement homes and providing in-home health services under contract with the Ministry of Health and the Ministry of Community and Social Services. Michaels contacted Bishop by telephone, told her of the cancellation of the Medox contract he had negotiated and enquired whether she was interested in taking over the staffing of health care aides at Brantwood. Bishop asked why Medox was not going to honour the contract. Michaels told her the owner of Medox had looked at the contract and did not think it was lucrative. Bishop was skeptical, but agreed to meet with the Hallatt's. The meeting took place before Christmas, 1983.

24. The Hallatt's asked Bishop whether she would take over the Medox contract on its existing terms. She was not satisfied with those terms. She was particularly troubled by the thirty-day billing arrangements which would have required her to finance sixty days of payroll on a continuous basis. She also felt the agreement was not explicit enough about control and supervision. She knew Mr. Hallatt was a lawyer, and felt she needed legal counsel. After discussing the matter with her partner in Med-Care Health Services Ltd., she decided to pursue the matter further and retained a lawyer. She asked her lawyer to prepare a contract reflecting billing arrangement more favourable to her and addressing in more detail the question of supervision, hiring, firing and orientation, matters on which she testified she had felt the Medox contract would not give her sufficient control. In the course of her discussions with her counsel, she also decided to incorporate a separate entity for purpose of entering into any contract with Brantwood.



25. Three or four meetings between Bishop and the Hallatt's led to the execution of a contract on January 21, 1984 by the Hallatt's on behalf of Brantwood and by Bishop on behalf of a newly activated numbered company later renamed Med+Experts Inc. The document itself had been prepared by Bishop's lawyer. The Hallatt's testified they could not recall their discussions with Bishop resulting in any specific change between the language of the first draft they saw and the language of the final draft they executed. The matters on which Mrs. Hallatt said she focused in the discussions leading up to the contract were the nature of the service to be provided, the rate to be paid, Mrs. Bishop's expertise and her ability to perform the services required. Mr. Hallatt recalls reading the contract over. When he was asked whether there were negotiations on any of its provisions, Mr. Hallatt said that he had asked for assurance that they were going to supply the necessary nursing staff and supervision trained to meet Brantwood's standards, as he did not want to have any problems with the Ministry of Health. Although the limited commitment made by Medox on December 9, 1983 was to expire in mid-January, 1984, at Bishop's request Medox extended their commitment to January 22nd, when Med+Experts would take over responsibility for staffing, and further agreed to leave their on-site supervisor, Lyn Hetman, in place for two or three weeks after that.

26. While employees originally hired and put in place as nurse aides/health care aides by Medox continued to work at Brantwood after January 22nd, Bishop advertised positions in local newspapers and conducted extensive interviews at the end of January. Those who had been hired originally by Medox were also interviewed. As a result of those interviews, Bishop decided to retain only about one-half of the Medox-hired employees and hired the balance of the required complement of nurse aide/health care aide workers from among the others she had interviewed. She was assisted in the interviewing process by Sandra Brown, whom she had hired on January 15th to perform on-site supervision under the then proposed but unexecuted contract with Brantwood. Brown received her orientation to the nursing home facilities and the established care plans on each floor from Lyn Hetman, the Medox supervisor. Brown then assumed the responsibility of orienting the health care aides who were new to the facility.

27. Before turning to the specifics of Brantwood's contracts with Hallmark and Med+Experts and the evidence we heard about the operation of those contracts, we will briefly describe the situation which existed at Brantwood in and after January 1984, and summarize the subsequent events said to demonstrate in Brantwood's management an "anti-union animus" relevant to the complainant's claim that Brantwood's "contracting out" constituted a violation of the unfair labour practice provisions of the *Labour Relations Act*.

28. Following the "contracting out" of housekeeping, laundry and health care aide functions, Brantwood continued to have direct employees engaged in various aspects of the operation of its nursing home. In addition to Mrs. Hallatt, Brantwood's management included Ms. South, the assistant administrator, and Ms. Tanya MacDonald, the director of nursing. By the time the agreement with Med+Experts came into effect, for reasons not explored in evidence before us, there was only one R.N. directly employed by Brantwood, and she was employed on a part-time basis two shifts per week. Other R.N.'s did work at Brantwood; these were supplied by Reimer and other personnel agencies. The terms of employment of R.N.'s supplied by agencies other than Med+Experts were not explored to any extent in the evidence before us, and it is not apparent whether ONA has taken or could take the position that these

persons fall within the unit that they represent or that they would be regarded at common law as employees at Brantwood while performing work on its premises.

29. The bargaining unit represented by CUPE includes registered nursing assistants ("R.N.A.'s"). During the period of operation of the Med+Experts' contract covered in evidence before us, Brantwood continued to directly employ four R.N.A.'s. Other R.N.A.'s worked in Brantwood's premises in that time period. Prior to March 1984, these additional R.N.A.s were supplied to Brantwood by personnel agencies on terms which were not the subject of evidence before us. After Med+Experts began supplying health care aides under its contract with Brantwood it discovered that it was unable to provide the level of supervision it considered necessary and still earn any profit under the terms of that contract. Seeing it as a way to enhance the profitability of its dealings with Brantwood, Med+Experts sought and was given the opportunity to supply R.N.'s and R.N.A.'s on terms which are not covered in the subject contract.

30. As we noted earlier, the kitchen function was not "contracted out", and the persons who performed that function continued to be directly employed by Brantwood. As with the directly employed R.N.A.'s, their employment continued to be subject to the terms of Brantwood's collective agreement with CUPE. Article 3 of that collective agreement requires that an amount equivalent to monthly union dues levied upon members of CUPE be deducted monthly by Brantwood from wages paid to employees in the bargaining unit. One of the complainant's allegations is that in January, 1984, Brantwood's bookkeeper, Diane Mendurla, advised members of the bargaining unit that they were not required to pay union dues, she requested from them letters directing that union dues not be deducted and she thereafter failed to deduct and remit the dues which ought to have been deducted from the wages of employees who provided such letters. Mr. Allan wrote to Mrs. Hallatt about the failure to deduct dues on May 24, 1984 and, in circumstances described later, submitted a policy grievance on that subject dated May 28, 1984. Mrs. Hallatt investigated the matter and discovered that the bookkeeper had ceased deducting dues from the wages from certain employees at the request of those employees. She directed that the appropriate amounts be deducted retroactively and prospectively from the wages of those employees, and on June 6, 1984 wrote to Mr. Allan saying, essentially, that Brantwood would do as he had asked in his letter of May 24. It is common ground that certain bargaining unit employees did request that dues no longer be deducted from their wages, and that Brantwood's bookkeeper acted in accordance with those requests. Nothing in the evidence we heard suggests that Ms. Mendurla or any other person outside the bargaining unit solicited or encouraged the making of these requests, although Ms. Mendurla may have asked that the employees' oral requests be confirmed in writing. There is no evidence that the Hallatt's were aware of the resulting breach of the collective agreement at any time before Mr. Allan drew it to their attention.

31. CUPE also complains that in May, 1984, Brantwood hired a new employee to work in the kitchen in a bargaining unit position, notwithstanding that members of the bargaining unit then on layoff were not recalled or given the opportunity to perform the work. Mr. Allan complained of this in a letter to Mrs. Hallatt of June 21, 1984. In her letter of June 25, 1984, Mrs. Hallatt replied as follows:

RE: Dietary Services

In reply to your letter dated June 21, 1984 regarding the *new* employee hired by

Brantwood Manor to work in the Dietary Department I wish to advise that Mrs. Gneth, Food Supervisor, is on vacation at this time. Mrs. Gneth is entirely responsible for the hiring of staff in the kitchen however on enquiring about this matter I have been advised by Mrs. Fernie, the Union Steward, that the opportunity to work in the kitchen for this position was offered to employees who were laid off but in view of the fact that this was only a temporary relief position, two days every third week-end no one would accept the position.

If you wish any further information on this matter please contact Mrs. Fernie or Mrs. Gneth.

32. Mrs. Hallatt testified that she was not aware of the hiring before it was brought to her attention by Mr. Allan. Her letter reflects what she discovered when she looked into the matter. Mrs. Fernie also testified. Her evidence-in-chief was to the same effect as Mrs. Hallatt's letter of June 25, 1984. In cross-examination she conceded that she personally had only spoken to those laid off employees who had previously worked in the kitchen and to some laid off housekeepers who she knew, but had not contacted any laid-off nurse aides. She conceded that Mrs. Holmes, a laid-off bargaining unit employee, had told her she was interested in the position and that she had told Mrs. Holmes she would have to fill out an application.

33. On April 6, 1984, CUPE gave Brantwood timely notice of its desire to bargain for the amendment of the existing collective agreement. Mrs. Hallatt replied by letter dated April 27, 1984, suggesting meeting dates and requesting the names of the members of the union's negotiating committee. Mr. Allan replied by letter dated May 24 agreeing to meet on June 11 and 12, two of the dates proposed in Mrs. Hallatt's letter, and identifying Joyce Fernie, Nan Lowes, Gillian Bowen and himself as the members of the negotiating committee. Mr. Hallatt entered into the correspondence with a letter dated May 25, 1984 which read as follows:

I acknowledge receipt of your letter of May 24th, 1984 addressed to Mrs. Hallatt.

Obviously, you must know that the dates June 11th, 1984 and June 12th, 1984 are not acceptable because we will be in bankruptcy court in Toronto on or about those specified dates in a bankruptcy action brought by CUPE against Brantwood Manor.

As you also know Nan Lowes and Gillian Bowen are not recognized by Brantwood Manor as proper members of the Negotiating Committee, for the obvious reason that they are no longer employees of Brantwood Manor. I therefore suggest that the existing employees (CUPE members) democratically elect their own Negotiating Committee.

With reference to the Union dues I suggest you straighten this matter out with your Union members as they have instructed us not to deduct their Union dues. This is your problem not ours.

The bankruptcy proceedings referred to had been commenced by CUPE in December 1983 on the basis of Brantwood's continued failure to pay its retroactive wage liability under the Rubenstein award. Mr. Allan replied by letter of May 28 pointing out that June 11 and 12 had been suggested by Mrs. Hallatt and offering June 21 and 22 as alternate meeting dates. He enclosed the aforementioned policy grievance with respect to union dues. On the subject of Ms. Lowes and Ms. Bowen he said this:

In reference to Ms. Lowes and Ms. Bowen, I point out to you that these people are still covered by the provisions of Article 8.04 (c), that is to say they are on layoff (in Ms. Bowen's case, effective October 23rd, 1983). I enclose copies of their layoff notices. So,



in effect they are still members of the CUPE bargaining unit and have been democratically elected by the members on Wednesday, May 23rd, 1984.

Mrs. Hallatt responded with the following letter dated June 6, 1984:

Re Notice to Commence Negotiations

Further to your letter dated May 28, 1984 I wish to advise that we will not recognize Ms. Lowes and Ms. Bowen on the bargaining committee as they have been permanently terminated and no longer employees of Brantwood Manor. We are however prepared to recognize any employees of Brantwood Manor who are CUPE members as the bargaining committee.

When you have rectified the above matter we will be pleased to arrange dates.

Mrs. Hallatt then prepared and sent a letter dated June 7, 1984, in the following form to each of the employees who had been laid off the previous fall:

Although the notice you received on December 14, 1983 terminating your employment was phrased as an Indefinite Lay-off, we have since been advised by the Ministry of Labour through its agent Mr. W. Lane, that a notice of Indefinite Lay-off where the lay-off exceeds thirteen weeks is deemed to be and is considered by the Ministry as a permanent termination of employment.

This notice is therefore given to you to clear up any uncertainty as to the status of your employment with Brantwood Manor Nursing Homes Limited. Your employment was effectively terminated as of December 14, 1983.

On June 8, Mrs. Hallatt wrote to Mr. Allan advising him of these notices.

34. Mr. Allan replied to that letter with his own of June 13, the first two paragraphs of which read as follows:

Re: Your Letter of June 8th, 1984

Notice of Termination

I find that your Notices of Termination of Employment given to all employees on indefinite layoff to be inappropriate under the circumstances and is an attempt to avoid the issue which is to commence bargaining with a committee elected by CUPE Local 1712.

Regardless of the advice that you received from the Ministry of Labour, I view the changing of the indefinite layoffs to terminations as a violation of the Labour Relations Act and I will be investigating this questionable manoeuvre further.

Mr. Hallatt's response of June 19, 1984 reads:

In reply to your letter dated June 13, 1984 directed to Mrs. Hallatt I can only say - you must be kidding.

It has been apparent for quite some time that anytime there has been a difference of opinion between you and Mrs. Hallatt she is threatened with "400 University Avenue".

One must also wonder if CUPE has a special relationship with "400 University Avenue".

35. Mrs. Fernie was the only member of the union's bargaining committee still working at Brantwood. She was aware of the Hallatt's objection to the constitution of the union's bargaining committee. She testified that she also objected to its composition. At some time in June, 1984, Mrs. Fernie discussed the composition of the bargaining committee with Mr. Hallatt in his office. While Mrs. Fernie was present, Mr. Hallatt initiated a conversation over his "speaker phone" with someone at the Ministry of Labour concerning the union's right to have "non-employees" on its bargaining committee. Whoever Hallatt spoke to said that the union had that right, but that the union's constitution might place restrictions on the composition of the bargaining committee and the way its members are selected. When Mrs. Fernie testified, she acknowledged having spoken by telephone to someone at the Ontario Labour Relations Board about the composition of the bargaining committee. She said she made the call herself, from her home. Until told of Mr. Hallatt's testimony, she denied she had been involved in a telephone conversation from Mr. Hallatt's office or spoken to Mr. Hallatt about the issue at all in the relevant time frame.

36. In late June, the Hallatt's received a copy of a letter dated June 25, 1984 to Mr. Allan from the Deputy Minister of Labour, acknowledging receipt of CUPE's application for the appointment of a conciliation officer and advising that it would be processed if no objection were received from the other party or parties within a certain period. Mrs. Hallatt then prepared the following letter to the Deputy Minister dated June 28, 1984:

RE: File No. 84-1121  
 Brantwood Manor Nursing Home  
 \_\_\_\_\_  
 ats [sic] CUPE Local 1712

We acknowledge receipt of your letter dated June 25, 1984 directed to Mr. Gordon  
 J. Allan.

We strongly object to CUPE's Application in this matter for the following reasons:

1. We are prepared and willing to sit down and negotiate the 1984 contract with the properly appointed bargaining committee of CUPE.
2. CUPE has failed and continues to refuse to appoint a proper committee composed of members of CUPE presently employed by Brantwood Manor.
3. Two of the bargaining committee, Ms. Lowes and Ms. Bowen appointed by CUPE are not employees of Brantwood Manor nor have they been appointed by CUPE members presently employed by Brantwood Manor.
4. Mrs. Joyce Fernie, the present Union Steward, who is employed by Brantwood Manor has stated emphatically that the CUPE members presently employed at Brantwood Manor comprising Local 1712 resent Mr. Allans actions by trying to forceably impose upon them the choice of Ms. Lowes and Ms. Bowen as members of the bargaining committee. They wish to appoint members of their own choosing.
5. We have been advised by Mrs. Fernie that Mr. Allan has insisted to them that the CUPE members presently employed at the Manor have no say in the matter.

I would suggest that for confirmation you consult with Mrs. Joyce Fernie.

Mrs. Hallatt then reviewed this letter with Mrs. Fernie and asked her to sign it below her own signature, beside the words "read and approved". Mrs. Fernie signed as requested, and the

letter was sent to the Deputy Minister in this form by registered mail. It appears to have crossed the Deputy Minister's letter of June 29, 1984 advising Mr. Allan that a conciliation officer had been appointed.

37. The parties had one meeting with the conciliation officer in August, 1984. Mr. Hallatt persisted in his complaints about the composition of the union's bargaining committee. Mr. Allan requested that the conciliation officer issue a "no board" report. The officer did so in due course, and CUPE gave Brantwood notice of its desire to proceed to interest arbitration and of the name of its nominee to an arbitration board, pursuant to the provisions of the *HLDAA*. As of December, 1984, Brantwood had refused to appoint its nominee to the interest arbitration board, and CUPE was awaiting a response to its request to the Minister of Labour that he appoint an employer nominee.

38. Ivan Marini is a Hamilton lawyer whom the Hallatt's retained to represent Brantwood in negotiations with ONA concerning the implementation of the retroactive and prospective wage increases granted by the Ladd award in December, 1982. In that capacity, Marini attended with the Hallatt's at a meeting on September 27, 1983 with a delegation from ONA. Elizabeth Woods, an employment relations officer employed by ONA, was a member of that delegation. ONA was seeking full implementation of the Ladd award. Brantwood was arguing about the effect on that award of the *Inflation Restraint Act* and was also requesting concessions with respect to the implementation of the award. Ms. Woods and Mr. Marini met apart from the others two or three times to explore further certain matters which had been raised in the main meeting and to obtain further information with respect to their respective principals' positions. During these meetings, Mr. Marini pressed the seriousness of Brantwood's financial position, and suggested that ONA should propose to waive or defer payment of the retroactive liability for wage increases. For her part, Ms. Woods stressed that the concern of the union and employees went beyond monetary matters and included the question of their continued job security, a matter she hoped could be discussed at the meeting.

39. It was Ms. Woods' testimony before us that Mr. Marini made the following comments in the course of these meetings: "Look at CUPE, they were irresponsible and are now paying the price", "We asked CUPE to wait and/or waive their retro. They wouldn't. Now look at what is happening to them" and, "Look, you don't know these people like I do. He bared his books to CUPE. They wouldn't co-operate. This employer is being vindictive to them." Ms. Woods said she took these as improper threats to ONA's statutory rights, and told Mr. Marini that she considered that they were grounds for an unfair labour practice charge. In his testimony, Mr. Marini acknowledged Ms. Woods had told him that his comments might be grounds for an unfair labour practice charge. He denied that they were. He said he told Ms. Woods that the Hallatt's were hard pressed financially and that if pressed further Mr. Hallatt intended to review the overhead costs associated with his employees, not out of vindictiveness but because his back was to the wall. He admitted he told Ms. Woods that Hallatt went to CUPE for co-operation, and that he may have said CUPE was irresponsible. He said he did not tell Woods that Brantwood's contracting out of work formerly performed by employees in CUPE's bargaining unit had been motivated by any vindictiveness toward CUPE on the Hallatt's behalf; he told Ms. Woods that the contracting out was the reaction of a businessman desperately looking for a solution to his financial problems. He stated that he was appalled that his comments had been put in issue in these proceedings, as he felt it had been understood and agreed by Ms. Woods that their discussions had been on a "without prejudice" basis. He remarked that during those discussions Ms. Woods had revealed that



bargaining unit members at Brantwood felt she and ONA were not doing enough for them and that she was under some pressure as a result. Mr. Marini said he regarded Ms. Woods' accusations of him as a reaction to that pressure.

### The Hallmark Contract

40. When Mrs. Hallatt accepted Hallmark's quotation at the end of September, 1983, she signed what appears to be a printed standard form document prepared by Hallmark. This two-page form provides for termination by either party on not less than 30 days written notice, and by Hallmark ("the contractor") on not less than five days written notice, if its accounts to Brantwood ("the customer") remain unpaid for more than thirty days. The customer agrees that it will not entice into its own employment any foremen, foreladies or other supervisory personnel employed by the contractor on the customer's premises, either during the term of the agreement or within twelve months after its termination. The document quotes a dollar figure "per month to cover our services including labour, equipment and materials and other services specified." The services covered are not specified in the two-page document itself. Under the heading "SERVICES", the document reads:

As per the contractor's quotation dated the 14 day of *September* 1983, which quotation is hereto annexed and is to be read into and form part of this agreement and the whole shall constitute the contract between the parties ...

The emphasized word and figures have been typed into the standard printed form. At the foot of the second page of the document, the quoted monthly dollar figure is broken down into specific costs for housekeeping services, maintenance services and laundry services.

41. The quotation incorporated by reference into the contract between Hallmark and Brantwood is a 43 page document. It sets out a detailed description of the cleaning, laundry and maintenance tasks covered by the contract and the frequency with which each is to be performed. The steps Hallmark proposes to take in commencing and continuing the operation of its contract are described. Hallmark's staff relations policies are set out, as are the rules it prescribes for its employees working in nursing homes.

42. The specific monthly cost figures for housekeeping services, maintenance services and laundry services which appear in the two-page contract document appear again in the quotation on three pages headed "Housekeeping Department" and "Maintenance Department" and "Laundry Department". Each such page first sets out a "staffing disposition" which specifies for each day of the week a number of hours' work in one or more categories. The housekeeping department staffing disposition shows 7.5 "resident foreman" hours each day, Monday through Friday, 30 "light duty hours" each day, Monday through Friday, 24 "light duty hours" on each of Saturday and Sunday and 7.5 "heavy duty hours" on Saturday and Sunday only. The total of 235.5 hours per week is set out, and Hallmark's "quotation for housekeeping services" appears directly below these hourly specifications. The quotation is expressed as including "all labour, equipment material and supervision" expressly excluding "washroom consumables". It appears from the proposal that the equipment and material would include buckets and wringers, carts, high speed floor machines and cleaning fluid or compound. The quotation for the laundry department shows 22.5 "laundry hours" each day, Monday through Friday, and 15 "laundry hours" on Saturday and Sunday for a specified total of 142.5 hours per week, below which the quotation is expressed to include "all labour and

supervision” excluding “laundry chemicals, linen supplies and equipment.” The maintenance department staffing disposition shows 7.5 “maintenance” hours each day, Monday through Friday. Although the number of hours of work per day are set out in each sub-quotation, the times at which these hours of work are to be performed are not set out in the quotation. The quotation expressly specifies that these would be established in coordination with the nursing home’s administrative staff.

43. The relationship of Hallmark’s workers to the nursing home’s administration and workers is addressed at several points in the quotation. For example, in material apparently intended for use by Hallmark with its own employees, the following instructions appear:

#### NURSING HOME POLICIES

##### 1. EMPLOYEE CONDUCT

All Hallmark Housekeeping employees are required to work in a quiet professional manner keeping safety of the residents and staff in mind.

##### 2. YOU AND THE RESIDENT

Remember this is the residents home and like you in your home, their privacy is most important. Always knock before entering room and introduce yourself to the residents when entering their rooms. If you have a problem concerning a resident see the charge nurse on that floor. If the problem is not corrected see you [sic] immediate Supervisor.

##### 3. RELATIONSHIP WITH OTHER DEPARTMENTS

As part of the health care team in this nursing home you are required to work in harmony with other departments. You are required to perform the duty that is outlined by your supervisor only. Small requests by other staff members may be completed also. Any major tasks must be authorized by your Supervisor.

Of some significance are the statements made on a page headed “Advantages of Using Hallmark Housekeeping Services Inc.”, which we reproduce here in full:

#### ADVANTAGES OF USING HALLMARK HOUSEKEEPING SERVICES INC.

##### COSTS

Hallmark Housekeeping Services will project a maximum annual cost guaranteed by contract.

##### STANDARDS

Quality standards are detailed in our specifications that form part of our contract. Flexibility of scheduling and specifications will allow the Administrator to modify the working contract and perhaps be more demanding than he would be of his own personnel.

##### PERSONNEL

Personnel can either remain on your payroll or that of Hallmark Housekeeping. Benefits and general rules of personnel management will be applicable in either case. Although Hallmark Housekeeping will implement rules and manage the personnel, at any time your administration can make suggestions and changes in such matters as discipline staff handling, hiring and firing.

## FINANCIAL

Budgeting procedures are made simpler for your organization since our costs are accurately forecasted for the year.

44. Mrs. Hallatt testified that Brantwood had not involved itself in the hiring, firing or discipline of any workers performing services specified in the Hallmark contract. She said that she deals with the on-site supervisor or with that supervisor's field supervisor, who visits the premises from time to time. While she was aware of the hours of work of employees in the housekeeping and laundry department, she was only concerned, she said, with "results". If reports of the regular inspections of the Home by Ministry of Health inspectors reveal matters of concern in the housekeeping or laundry department, she merely draws these to the attention of Hallmark and expects them to deal with the problem. While some minor aspects of the work covered by the Hallmark contract were previously performed by outside contractors, such as semi-annual exterior cleaning of windows, substantially all of the work performed by workers engaged as a result of the Hallmark contract was performed by direct employees of Brantwood in the CUPE bargaining unit prior to the layoffs of October 1983.

## Med+Experts Contract

45. As we have noted earlier, Med+Experts' then principal, Ms. Bishop, was not prepared to commit it to the terms of the Medox contract. The written contract between Brantwood and Med+Experts was the result of her solicitor's drafting and, to an extent which is not entirely clear, subsequent discussions with the Hallatt's. There were a number of differences between the Medox and Med+Experts contracts. The first is that, unlike the Medox contract, the Med+Experts contract refers expressly and repeatedly to the requirements of the *Nursing Homes Act*. These references first appear in the extensive recitals to the contract and continue throughout the body of the contract. The recitals read:

WHEREAS Brantwood owns and operates Brantwood Manor at 802 Hagar Avenue, Burlington, Ontario, (hereinafter referred to as the "Home");

AND WHEREAS Brantwood is licensed by the Ministry of Health of the Province of Ontario pursuant to the provisions of The Nursing Homes Act R.S.O. 1980, Chapter 320 (hereinafter referred to as the "Act") and the Regulations issued pursuant thereto (hereinafter referred to as the "Regulations") to operate the Home as a nursing home;

AND WHEREAS the Act and the Regulations contain specific requirements which must be met in order that Brantwood will maintain its license;

AND WHEREAS Brantwood provides "nursing care" (as such term is defined in the Regulations) to residents of the Home;

AND WHEREAS Brantwood is required under the Act and the Regulations to provide a high quality of nursing care and in that regard must maintain a "nursing staff" (as such term is defined in the Regulations);

AND WHEREAS the contractor has represented to Brantwood that it is in a position to provide qualified competent non-professional nursing staff to the Home;

AND WHEREAS the parties desire to enter into this Agreement pursuant to which the Contractor will provide certain staff to the Home:



Before turning to the relevant provisions of the body of the contract, we will examine certain of the provisions of the *Nursing Homes Act* and regulations thereunder.

46. The *Nursing Homes Act*, R.S.O. 1980, c.320, as amended, defines “nursing home” to mean

... any premises maintained and operated for persons requiring nursing care or in which such is provided to two or more unrelated persons ...

with certain exceptions not material here. Section 3 of the Act provides that no one may “establish, operate or maintain a nursing home except under the authority of a licence ...”. The Act provides for the appointment of inspectors who have the power to make inspections of nursing homes to ensure that the Act and regulations thereunder are being complied with. Section 20 of the Act provides, in part:

The Lieutenant Governor in Council may make such regulations in respect of nursing homes as are considered necessary to carry out the purposes of this Act, and in particular,

• • •

- (b) governing the services, care, facilities and amenities that nursing homes shall provide and governing and prescribing the staff requirements and duties of staff in respect of the care and services that shall be provided residents;

• • •

- (g) respecting the management and operation of nursing homes;

- (h) respecting the officers, staff and employees of nursing homes and prescribing their duties, responsibilities and qualifications for employment;

• • •

- (j) requiring in-service training programs to be provided staff and employees.

Regulations made under this authority (Regulation 690, R.R.O. 1980, as amended) establish the following definitions:

- 1. In this Regulation,

- 1. “administrator” means a person in charge of a nursing home;

• • •

- 13. “in-service training” means a program for staff education and development encompassing orientation, skill development and continuing education;

• • •

- 22. “nursing staff” includes a registered nurse, a registered nursing assistant and a health care aide also known as a non-registered nurses aide.

Under the heading “Nursing Care”, section 56 of the Regulations provides, in subsections (1) and (2):

56.-(1) Every resident shall be given nursing care in accordance with his needs and the care shall be given under the supervision of a registered nurse or a registered nursing assistant as directed by a physician.

(2) A thorough assessment of each resident's needs shall be made on a regular basis by the registered nursing staff and a care plan shall be devised for every resident.

The balance of that section deals with more specific requirements for the provision of nursing care. Sections 57 and 58 specify the quantity of nursing and personal care, measured in hours per day and hours per week, which must be provided to each resident, broken down as to the time to be spent by registered nurses and the time to be spent by registered nursing assistants and health care aides.

47. Under the heading "Nursing Staff", sections 59 and 60 of the Regulations provide, in part:

59.-(1) Every administrator shall ensure that there is a twenty-four hour nursing service provided in the nursing home to meet the residents' needs.

60.-(1) Every nursing home shall have a registered nurse who is designated as the director of nurses, and who is responsible for,

- (a) the organization, direction and evaluation of nursing care;
- (b) directing the work of the nursing staff in the nursing home; and
- (c) the organization and direction of in-service training programs for nursing staff.

(2) Every nursing home shall conduct in-service training programs for all nursing staff in the nursing home at least once a month.

Subsection (3) of section 60 specifies the minimum number of hours of work per week of the director of nurses as a function of the number of beds in the nursing home. That subsection requires that a director of nursing work 40 hours per week in a nursing home with more than 80 beds. Subsections (4) and (5) require that:

60.-(4) Every nursing home shall have a registered nurse on call at all times, who shall be a regular member of the nursing staff.

(5) Every nursing home shall have on staff at all times a sufficient number of nursing personnel to provide the care required to be given under subsection 57(2) and subsection 58(1).

Under the heading "Employees General", sections 81, 82 and 83 of the Regulations set out requirements for pre-employment and annual medical examinations and minimum health requirements for persons employed or to be employed in a nursing home, and section 84 provides:

Every nursing home shall establish and maintain an in-service training program for nursing home staff for both initial orientation and continuing education.

Sections 91, 92 and 93 of the Regulations require that certain personnel records be maintained and retained with respect to "each person employed in the nursing home."

48. Returning to the contract between Med+Experts and Brantwood, the first of the terms of that agreement provides:

1. The Contractor represents that it is in a position to and will in fact provide non-professional nursing staff to the Home who are qualified and competent to perform the required duties in accordance with accepted practices and standards.

Paragraph 2 recites the requirements imposed on the nursing home by subsection 60(1) of the Regulations, and paragraph 3 of the agreement provides:

3. Brantwood represents that it presently has and will continue to have a qualified competent director of nurses whose duties and responsibilities include the matters set out in paragraph 2.

Paragraphs 4 and 5 of the agreement speak to the provision and hiring of “staff”:

4. The Contractor will administrate and assume responsibility for the provision of staff in the number specified by Brantwood in the classification of nurse aide and health care aide.
5. Hiring of staff by the contractor shall be based on standard criteria including professional individual interviews which focus on educational and experiential background, testing, reference verification and specialty background. References and reference verification shall be retained by the Contractor and filed with the employee’s permanent records, and shall be made available to Brantwood on request.

Paragraph 6 of the agreement recites the requirements imposed on the nursing home by sections 81 through 83 of the Regulations. Paragraph 7 requires that staff provided by the contractor must undergo the examinations and provide the certificates specified by the Regulations, and goes on to require that the required physician’s certificates be provided to Brantwood. Paragraph 8 requires that applicants for employment with the contractor have either a certificate of successful completion of a health care aide course or recent acceptable work experience in a nursing home as a nurses’ aide. That paragraph of the contract requires that a copy of any certificate be provided to Brantwood.

49. Paragraphs 8 and 9 of the agreement require that applicants for employment complete a “nursing skills checklist” and “self-evaluation”. These paragraphs require that Brantwood be consulted with respect to the contents of the checklist, which is to be revised in accordance with any requirements that Brantwood may specify, and further requires that a copies of self-evaluations and testing results for each applicant be provided to Brantwood. Paragraphs 11 through 15 of the agreement deal with the regular evaluation of “staff members”. Paragraphs 13 and 14 provide:

13. *Employee evaluations shall include the evaluation of the director of nurses of the Home.*

14. *All employee evaluations will be discussed by the director of nurses and the party responsible therefor on the Contractor’s staff, with the individual whose performance is being reviewed. The employee shall have the right to submit written comments or responses to the reviewer for attachment to the evaluation.*

(emphasis added)

Copies of each evaluation are to be provided to Brantwood.



50. Paragraph 16 of the agreement requires that Brantwood provides the contractor with copies of its job descriptions, policies and procedures, which the contractor is required to review with job applicants. Paragraphs 17 through 26 provide:

17. Brantwood and the Contractor shall prepare an orientation program based on and conforming to the Home's program.

18. *The Contractor's personnel shall be required to comply with the Home's orientation and in-service programs, policies, procedures standing orders, and such written rules as may be agreed upon between Brantwood and the Contractor.*

(emphasis added)

19. The contractor shall supply staff who are properly trained and educated, adequately oriented to the work environment and who accept the responsibility of providing qualitative and quantitative care to the residents of the Home in accordance with accepted practices and standards.

20. The Contractor shall be responsible for the recruitment, interviewing, screening, hiring, firing, replacement, scheduling, re-scheduling, control, direction and quality of all staff supplied to the Home pursuant to this Agreement.

21. *The Administrator and/or the director of nurses of the Home shall have the final approval as to whether or not staff supplied by the contractor are suitable. Any staff member deemed not to be suitable at any time shall be replaced immediately by the Contractor.*

22. The Contractor shall provide a part-time onsite co-ordinator/supervisor as reasonably required at no cost to Brantwood *whose function shall be to ensure that the directives of the director of nurses are complied with, and that the policies and procedures of the Home are complied with and that work assignments are properly carried out. It is understood however that the director of nurses shall at all times have overriding authority and jurisdiction as required by the Act.* The co-ordinator/supervisor will be at the Home for a minimum period each week as agreed by the administrator of the Home and the Contractor.

23. The Contractor understands and agrees that the quality of nursing care is of paramount concern. In this regard it is further understood and agreed that the continuity of resident care is of utmost importance. Further, the Home operates on a 24-hour a day, 7 day a week basis. Accordingly, to the extent reasonably possible, regular staff shall be placed in the Home on a consistent basis.

24. Brantwood nursing personnel will co-ordinate the care requirements of residents, and liase [sic] closely with the Contractor's supervisory staff in that regard.

25. Brantwood shall ensure that the Contractor's supervisory staff are kept fully informed of any special care which residents of the Home may require.

26. Brantwood personnel shall meet with authorized supervisory staff of the Contractor at regular intervals (but at least bi-weekly) to discuss staffing requirements and provide progress reports on services required, and given, by the Contractor's personnel.

(emphasis added)

Paragraphs 29 and 30 provide:

29. It is understood that approximately 22 staff members will be required on a daily

basis depending on the level of care required by the residents and as stipulated by the director of nurses. If a staff member who is scheduled to work at the Home fails to report, the Contractor shall provide a replacement employee as soon as possible. Should the replacement employee fail to report within 1 hour of the request from Brantwood without reasonable explanation from the Contractor, Brantwood reserves the right to obtain its own replacement.

30. The Contractor shall be responsible for maintenance of all payroll and personnel records of its staff, and shall pay all wages, (as established by the Contractor), benefits, deductions, and remittances, and comply with all governing lawful requirements (including The Employment Standards Act, The Worker's Compensation Act, the Income Tax Act, The Unemployment Insurance Act) respecting employment of its staff supplied to the Home.

Paragraph 31 requires the contractor to obtain and maintain liability and bonding insurance on all personnel pursuant to policies in which Brantwood is to be a named insured. Paragraphs 32 and 33 provide:

32. Brantwood will be invoiced weekly by the Monday of each week for the prior week ending Saturday midnight, which invoice shall be paid within 3 days of receipt.

33. The hourly billing rate for staff provided under this Agreement will be \$6.25 per hour worked. Hours worked for a full shift will be 8 hours inclusive of a 1/2 hour lunch break and two 15-minute rest breaks, one in each 1/2 shift, and for a part shift will be 5 hours (or less as agreed to) inclusive of one 15-minute rest break. The rate paid on a statutory holiday, as defined in the Employment Standards Act and any other governing declared statutory holiday and overtime authorized by Brantwood will be 1-1/2 times the stated rate. Effective October 1, 1984 the hourly billing rate shall increase to \$6.56. The rates specified include all fringe and statutory benefits, including vacation pay, holiday pay, unemployment insurance, Worker's Compensation and Canada Pension Plan payments to or for employees plus non-authorized overtime.

Paragraph 34 provides that the rates mentioned in section 33 will be in effect until January 19, 1985, and paragraph 37 contemplates that negotiation of the rate which would apply thereafter is to commence at some point in the 60-day period prior to that date. Paragraph 35 of the agreement provides that it may be terminated by either party at any time on 60 days' written notice.

51. The agreement between Brantwood and Med+Experts provides that notice to Med+Experts under the agreement may be given to Med+Experts personally at Brantwood's premises or by mail directed to the municipal address of Brantwood's premises. Although no provision for it is made in the agreement, Brantwood provides Med+Experts with the rent-free use of an office in which Med+Experts deals with the matters contemplated by the agreement, including the interviewing of prospective employees. For some months after the contract began, Med+Experts kept personnel records relating to the staff it supplied to Brantwood in a filing cabinet in this office.

52. The respondents led evidence about the day-to-day relationships of Brantwood and Med+Experts and their respective managerial staff and workers. It was the respondents' contention that the relationships as they existed in practice were different from those contemplated in the parties' agreement. They argued that in analyzing their relationship, the Board should ignore those contractual provisions to which they had not resorted in practice and that the circumstances in which the contract was performed should be examined in assessing the significance of the terms of their agreement.

53. By the terms of the contract, Brantwood determines the number of persons to be

employed by Med+Experts in Brantwood's premises as health care aide/nurse aides. Mrs. Hallatt testified that staffing levels are effectively determined by the "recommendations" made from time to time by Ministry of Health inspectors. While she acknowledged that these "recommendations" are not "requirements", she said that in her experience it would be imprudent of a nursing home licensee to fail to follow the recommendations a nursing home inspector. While she acknowledged she was free to retain more staff than the inspectors recommended, she made it clear that Brantwood had no intention of providing nursing services in excess of those which the inspector's recommendations effectively required of it. Nevertheless, as between Brantwood and Med+Experts, Brantwood does determine the number of people employed by Med+Experts in Brantwood's premises.

54. Under their agreement, Brantwood pays Med+Experts at a fixed hourly rate for the number of hours of work performed by the health care aides Med+Experts supplies. The amount Med+Experts can pay to those health care aides is highly dependent on hourly rate Brantwood has agreed to pay Med+Experts. The agreement does not directly control Med+Experts' allocation of revenue as between wages and other expenses, however, and the evidence is that the hourly rates paid by Med+Experts to health care aides at Brantwood were increased at least once during the term of the agreement, while the hourly rate paid by Brantwood to Med+Experts remained unchanged.

55. The agreement contemplates that Med+Experts will be solely responsible for the hiring process itself, and the evidence is consistent with that. It is apparent that the persons who have performed that function on behalf of Med+Experts had the necessary experience and training to properly evaluate job applicants. The agreement requires that certain information and documentation be obtained from job applicants and employees and made available to Brantwood. The evidence is that these materials are obtained and are available to Brantwood, but that Brantwood has never actually asked to see any of this documentation itself. When nursing home inspectors have asked to review the records in which such information should be kept, Brantwood has referred them to Med+Experts, which has made its employee files available to the inspectors. Paragraphs 9 and 10 of the agreement refer to a nursing skills checklist and self evaluation which are to be completed by applicants for employment with Med+Experts. While paragraph 9 requires that Brantwood be consulted with respect to the contents of the checklist, the checklist used by Med+Experts was prepared by it without consultation with Brantwood. While paragraph 10 of the agreement requires that self evaluations in testing results be provided to Brantwood, such materials have not actually been provided; although Med+Experts would make them available to Brantwood if it requested, no such request has been made.

56. Paragraph 16 of the agreement contemplates that Med+Experts will instruct job applicants by reference to job descriptions, policies and procedures dictated by Brantwood. Ms. Bishop testified that Mrs. Hallatt, Ms. South and Ms. MacDonald provided her with Brantwood's health care aide/nurse aide job description when Med+Experts' contract commenced. The described functions of health care aide/nurse aides included administering enemas and suppositories. Ms. Bishop took exception to that assignment, as it was her view that these tasks were more appropriately the function of an R.N.A. Brantwood accepted this position. In the result, the Med+Experts job description for health care aide/nurse aides differs from Brantwood's previous job description in those respects. Ms. Bishop and Med+Experts' current general manager, Elvie Hall, explained that Med+Experts had developed its own job descriptions, and that the clear similarities between their job descriptions



and those of Brantwood reflected the fact that job functions in nursing homes are highly standardized. As for policies and procedures, Mrs. Hallatt acknowledged that Brantwood had a manual which covered nursing policies and procedures, and that those policies and procedures governed the few remaining direct employees of Brantwood. She testified she thought that Med+Experts had its own manual which governed the work of its staff. In fact, Med+Experts does not have its own manual with respect to the policies and procedures to be followed by the persons it supplies to Brantwood. The thrust of testimony of Med+Experts' witnesses was that while the manual their employees had at hand at Brantwood was Brantwood's manual, nursing policies and procedures are highly standardized and vary little from nursing home to nursing home.

57. Although the agreement contemplates that in-service programs will be arranged jointly by the parties, the evidence of the respondents was that Brantwood's director of nursing conducts in-service programs only for Brantwood's few remaining direct employees, while Med+Experts arranges and conducts its own in-service programs for the persons it hires. Brantwood's director of nursing is not regarded by Med+Experts as having any role in Med+Experts' in-service training program. In the matter of evaluation, paragraphs 13 and 14 of the agreement contemplate the direct involvement of Brantwood's director of nursing in the evaluation of the health care aides supplied by Med+Experts. There is no evidence that she has actually been involved with Med+Experts personnel in the evaluation of health care aides. Elvie Hall testified that she had blocked attempts by the director of nursing, Ms. MacDonald, to have evaluation meetings with Med+Experts staff. At one point in her evidence, however, Ms. Hall said it had been Med+Experts' *registered* staff, the R.N.'s and R.N.A.'s supplied by Med+Experts outside the terms of the subject contract, with whom the director of nursing had sought to meet for purposes of evaluation. It is not clear whether Brantwood's director of nursing ever sought to exercise Brantwood's contractual right to participate actively in the evaluation of health care aides.

58. Med+Experts' agreement with Brantwood requires that it provide "a part-time on-site co-ordinator/supervisor as reasonably required at no cost to Brantwood". This function is performed by Ms. Brown, a full-time Med+Experts employee who spends her working hours at Brantwood. During the first few weeks of the operation of the contract, Ms. Bishop was also on-site for a great deal of time. Ms. Bishop's role was taken over by Ms. Hall, who also spent time at Brantwood. When Ms. Hall became general manager of Med+Experts after Ms. Bishop sold her interest in the company, Eileen Bradjovic took over Ms. Hall's role as immediate supervisor to Ms. Brown, and Ms. Bradjovic now attends at Brantwood regularly, although not on a full-time basis. While paragraph 22 of the agreement states that the function of the on-site co-ordinator is to "ensure that the directives of the director of nurses are complied with, and that the policies and procedures of the Home are complied with and that work assignments are properly carried out...", Med+Experts own job description for that position contains no suggestion that she serves as a conduit for directives of Brantwood's director of nurses. That job description focuses on her administrative and clerical responsibilities under Med+Experts' policies and procedures, her training and supervision responsibilities with respect to health care aides, her disciplinary powers (which are to be exercised under the direction of Med+Experts' general manager) and her function as representative of Med+Experts on any standing committee in the facility. The only reference in her job description to her relationship to Brantwood's director of nurses is a statement that one of a number of her "key responsibilities" is "liasing [sic] with the Director of Nursing and other Non-Med+Experts personnel to ensure quality care."

59. As we noted earlier, when Med+Experts began supplying health care aides, a number of the R.N.'s and R.N.A.'s working in Brantwood's facility were being supplied by other agencies. Med+Experts sought and was granted the opportunity to supply Brantwood's needs in this regard, and this developed into a regular practise in which Brantwood's director of nurses would schedule the hours of work of its four R.N.A.'s and one R.N. and the two R.N.'s regularly supplied by another agency (Reimer), and Med+Experts would then fill the balance of the R.N. and R.N.A. shifts with personnel it recruited and treated as its own employees. Med+Experts' job description for this "acting supervisor" position reads as follows:

In the absence of the Med + Experts on site Co-ordinator or General Manager the Reg. Nurse or Reg. Nursing Assistant on duty acts as OUR Supervisor.

Med + Experts has at least one Registered person on duty at all times. She is responsible in addition to her normal and regular staff function for the following:

- to deal with any immediate problems regarding OUR staff as they arise
- to discipline, direct staff as required
- to contact the on call person of anything she feels should be dealt with immediately and outside of her realm.
- to follow up with the Med+Experts co-ordinator or manager any action taken on her shift.
- to liaise with the non Med+Experts staff on her shift to facilitate team approach.
- If she feels, that at the completion of her shift, that she must stay on for additional time due to problems (patient or staff) or that she needs to keep an aide longer than her shift - she may do so - without seeking approval from anyone.
- All other related duties as required from time to time.

NOTE: The acting supervisor is not required to handel [sic] any bookoffs this will be done by the on call co-ordinator.

60. In the job description it developed for the health care aides after it began supplying them, Med+Experts describes their "accountability" as follows:

#### ACCOUNTABILITY

Responsible to the Med + Experts Supervisor (Co-ordinator, R.N., R.N.A. Manager) on duty, for the care of her assigned residents plus other duties as assigned from time to time by the Med+Experts Supervisor.

61. Med+Experts' job description for the registered nurses it provides describes their accountability as follows:

#### ACCOUNTABILITY

Responsible to provide care in accordance with the Standards of Practise, College of Nurses of Ontario. Reports to, and confirs [sic] with the Director of Nursing on all matters related to resident care. Reports to and confirs [sic] with the Med + Experts Manager on all matters related to job description, staffing concerns, staff problems, performance etc.

Med+Experts' job description for registered nursing assistants contains a similar description of accountability:

#### ACCOUNTABILITY

Under the direction of the Registered nurse as outlined in the STANDARDS OF PRACTISE - College of Nurses, Ontario. Reports to and confirms [sic] with the registered nurse on all matters related to resident care. Reports to and confirms [sic] with the Med + Experts Co-ordinator or Manager on all matters related to job descriptions, staffing concerns, staff problems, performance etc.

62. The respondents' position is that the discharge and discipline of health care aides supplied by Med+Experts are the exclusive province of Med+Experts. While paragraph 21 of its agreement with Brantwood provides that Brantwood's administrator or director of nurses has the final approval as to whether or not staff supplied are suitable, and requires that staff deemed unsuitable be replaced by Med+Experts, Med+Experts says it has resisted and would resist that kind of control over its staff. Mrs. Hallatt says she did not read the contract, and was not aware of that provision. Evidence was led with respect to several incidents said to illustrate the absence of actual control by Brantwood. One involved a complaint by Mr. Hallatt that one of Med+Experts' staff had acted in an arrogant fashion by parking her bicycle in front of his office window. It is not clear whether he expressly asked that the employee be disciplined or discharged. In any event, Med+Experts did nothing. Another complaint by Mr. Hallatt involved a Med+Experts staff person who by answering a knock at the door permitted entry by an intruder who assaulted two other persons. It appears Mr. Hallatt's complaint was that she ought not to have answered the door. Med+Experts personnel looked into the incident, and concluded that discharge was not warranted. In another incident, the director of nurses complained that one of Med+Experts' staff had been too rough with a patient and said she ought to be terminated. The Med+Experts supervisor looked into the matter, spent some time working with the worker in question and concluded that she had good skills and was worth keeping. She was not terminated. It is apparent from the evidence that when the management of Med+Experts concluded that an employee complained of by Brantwood should not be dealt with as contemplated in Brantwood's initial complaint, this conclusion was discussed with Brantwood's management, who were ultimately prepared to accept Med+Experts' judgement in each of the incidents referred to in evidence.

63. Various of the provisions of their agreement require that Brantwood and Med+Experts' personnel "meet", "co-ordinate" and "liaise". This leads to regular, sometimes daily, meetings between members of the supervisory staff in both organizations concerning the provision of nursing and personal care to residents of the nursing home. Health care aides report on patient care related matters to the R.N. or R.N.A. in charge of the floor on which they work; that R.N. or R.N.A. may give "advice" to the health care aide, no matter who is the nominal employer of the R.N. or the R.N.A. In cross-examination by applicant's counsel of Med+Experts' witnesses, attention was focused on the degree to which Brantwood's Director of Nurses or one of its directly employed R.N.'s or R.N.A.'s could, with effect, give a direct "order" to a health care aide supplied by Med+Experts. It was conceded that this could happen in an emergency; otherwise, it would depend on whether the "request" was "reasonable". It was conceded that Med+Experts' personnel would comply with "reasonable requests" without necessity of a preliminary high-level conference between the administrator or director of nurses on the one hand and Med+Experts' general manager or on-site supervisor on the other. It is not apparent how Med+Experts' health care aides are



instructed or expected to distinguish reasonable requests from unreasonable ones when they are made by an R.N. or R.N.A. concerning hands-on nursing and personal care. Apart from emergencies and reasonable requests, Ms. Hall testified that a registered staff member employed by Brantwood who required that direction be given to a health care aide employed by Med+Experts would have to discuss the matter with Med+Experts' supervisory personnel. As an example, Ms. Hall described an incident in which one of the R.N.A.'s employed by Brantwood had contacted her by telephone to complain about difficulties she was having with one of Med+Experts' health care aides. In response, Ms. Hall spoke to the Med+Experts' supplied R.N.A. who was then on site, and instructed her to deal with the problem.

64. Both Ms. Bishop and Ms. Hall testified that in the initial weeks after Med+Experts assumed responsibility for staffing there were frequent difficulties and disputes arising out of the assertion by Brantwood managerial personnel of direction and control over Med+Experts' staff, but that these difficulties diminished with time, as Brantwood and Med+Experts sorted out their lines of communication and control.

### The Accreditation Application

65. When Mrs. Hallatt returned to the active management of Brantwood Manor in May of 1983, she became interested in applying to the Canadian Council on Hospital Accreditation for accreditation of Brantwood Manor as a long-term care institution. Success in such an application appears to depend, in part, on the applicant's having a comprehensive manual covering all aspects of the operation of its nursing home. In May of 1983, Mrs. Hallatt met with representatives of a company called Diversacare, which she understood had spent thousands of dollars preparing manuals suitable for accreditation applications by nursing homes. She examined their manuals and agreed to purchase a version custom tailored for Brantwood. She edited the contents of the manual she had been shown to make whatever changes were necessary to have them conform to Brantwood Manor's operations, and sent them back to the Diversacare to be put through their word processor. In the result, Mrs. Hallatt received an administration manual which, with further revisions, formed part of the material shown to the surveyor from the Canadian Council on Hospital Accreditation who attended at Brantwood in September, 1984. Portions of the manual were introduced in evidence during cross-examination of the respondents' witnesses.

66. In the portion dealing with "organization and staffing" of the Home as of August, 1984, the administration manual Brantwood presented to the surveyor states:

The staffing consists of approximately 100 full-time and part-time employees, which include R.N.'s and R.N.A.'s, Nurses' Aides, Dietary Staff, Maintenance, Housekeeping and Laundry staff and a hairdresser.

(emphasis added)

The number 100 makes sense only if it includes persons supplied by Med+Experts and Hallmark, persons whom Brantwood claims in this proceeding are not *its* employees. There is no mention of Med+Experts or Hallmark in the text which forms the immediate context of the quoted paragraph.

67. The administration manual contains a number of job or "position" descriptions,

which are in many ways inconsistent with the respondents' evidence. For example, the Administrator is described as having a number of persons as her "immediate subordinates", including the "Housekeeping & Maintenance Supervisor". The index to the administration manual refers to job descriptions for Housekeeping/Laundry/Maintenance Supervisor, Housekeeping Aide, Laundry Aide and "Maintenance staff person". The position description dated June 1983 for the Housekeeping/Laundry/Maintenance Supervisor bears the handwritten notation "REVISED APRIL/84". The handwritten words "Hallmark Regional Manager" now appear beside the typewritten words "REPORTS TO:" near the beginning of the description. The last of 23 sentences describing the position's "key responsibilities" still reads:

"Performs other related duties as delegated by the Administrator."

68. The administration manual contains job descriptions for "registered nurse", "registered nursing assistant" and "health care aide". Although these descriptions, like the "staffing" description quoted earlier, are not limited by any reference to the nominal employer of the person in the position described, Mrs. Hallatt says they are intended only to describe the jobs of direct employees of Brantwood and not the jobs of persons supplied by Med+Experts. The position description in the administration manual for "registered nurse" is marked "Revised April 1984". "Registered Nurse" is described as reporting to the Director of Nursing and having as immediate subordinates both registered nursing assistants and health care aides. The description for Registered Nursing Assistant is also marked "Revised April 1984" and says that a person in that position reports to "Registered Nurse" and has Health Care Aides as immediate subordinates. The manual contains an undated position description for "Health Care Aide/Nursing Aide/Orderly", which is described as reporting to "Registered Nurse" or "Registered Nursing Assistant". It is apparent these descriptions cannot be made to fit the evidence by the device of saying they describe only the one R.N. and four R.N.A.'s whom Brantwood admits employing. Even then, those persons are still described as having health care aides as their "immediate subordinates". It was not explained why that aspect of these descriptions were not revised in April 1984 if, as the respondents sought to demonstrate here, health care aides were not then the subordinates in any ordinary sense of R.N.'s or R.N.A.'s employed by Brantwood.

69. The position description for the Director of Nursing is marked "last reviewed July 1984" and signed as approved by Mrs. Hallatt. It indicates that the Director of Nursing reports to the Administrator and has Registered Nurses, Registered Nursing Assistants and *Health Care Aides* as her immediate subordinates. In the body of that description, the functions of the Director of Nursing are said to include "directing" and "staffing" in relation to nursing care. The "key responsibilities" described include developing of written job descriptions for each level of nursing personnel, arranging of in-service education programmes, discussing with and recommending to the administrator the number and type of personnel needed, initiating recruiting of nursing personnel, orienting such personnel and documenting recommendations relative to termination of such personnel. Both Ms. Hall and Mrs. Hallatt testified that this description does not accurately reflect the responsibilities and powers of the Director of Nursing to the extent it suggests that she has any control over the hiring, firing, discipline, in-service education or daily activities of any of the approximately 60 people Brantwood describes as its "nursing staff" other than the one R.N. and four R.N.A.'s which Brantwood concedes are its direct employees. Ms. Hallatt's explanation for the discrepancies in the description of the director of nursing position was that the revision of these descriptions had been the responsibility of her assistant administrator, Ms. South, who, it now appeared to Ms. Hallatt, had not gone over them with a fine-tooth comb to ensure that they reflect all

the differences between Brantwood's form of operation and the ordinary form of nursing home operation for which the Diversicare manuals were originally designed. Ms. South was not called as a witness nor, as we have already noted, was the Director of Nursing, Ms. McDonald.

70. In addition to the job descriptions in the administrative manual, the accreditation surveyor was also shown Brantwood's written contracts with Med+Experts and Hallmark. The surveyor met with Ms. South, Ms. McDonald, Ms. Hall, Ms. Brown and a representative of Hallmark to discuss Brantwood's relationship with Hallmark and Med+Experts. Mrs. Hallatt believes Ms. South explained to the surveyor the actual role of Brantwood's Director of Nurses, and for that reason was not concerned about the fact that the description in the administration manual of the Director of Nursing position was not accurate.

### Argument

71. Counsel for the complainant trade union argues that the workers supplied by Hallmark and Med+Experts are Brantwood's employees as a matter of law, by virtue of the nature and degree of control Brantwood exercises over them and their work. Alternatively, counsel argues that in each case Brantwood and the contractor share control over employees in such a manner and in such circumstances as to warrant a declaration under subsection 1(4) of the *Labour Relations Act* that the contractor and Brantwood constitute one employer for the purposes of the Act.

72. Counsel submits the Board must take into account the provisions of the *Nursing Homes Act* and regulations thereunder in assessing the degree of control Brantwood has over the contractors and the workers they supply. He argues that the *Nursing Homes Act* and regulations generally, and particularly those provisions which deal with the obligations of the director of nursing, require a nursing home licensee's management to exercise such control over those who work in the home, and particularly over those who provide nursing and personal care to its residents, that the licensee must remain the employer of those workers in order to comply with those provisions. If the facts suggest Brantwood is not still the employer of the workers in question, then Brantwood must be in violation of the *Nursing Homes Act* and regulations. Counsel argued that we should assess this case as though Brantwood were complying with that Act, even if it appears it is not, because we should neither condone a breach of that Act nor expect non-compliance to be a continuing state of affairs, and because compliance with the *Nursing Homes Act* is expressly required by Brantwood's contract with Med+Experts.

73. Counsel for the complainant relies heavily on the provisions of the contracts between Brantwood and the respondent contractors. He submits that those contracts provide Brantwood with such control over the contractors and the workers they provide as to justify either a finding that Brantwood is the employer of those workers or a declaration under subsection 1(4). Counsel submits that the contracts executed in October 1983 and January 1984 provide more reliable evidence of the parties' relationships and intentions than the respondents' later oral evidence which purported to describe the relationships as they had developed after the contracts were executed. Counsel notes that a good deal of that testimony was given after the release in May 1984 of the arbitration award in the *Thompson House* case (*Re Don Mills Foundation For Senior Citizens* (1984), 14 L.A.C. (3d) 385 (P.C. Picher)) and in July 1984



of this Board's decision in *Kennedy Lodge Inc.*, *supra*. These decisions, he suggests, would have affected the parties' evidence and behaviour thereafter. Counsel also relies on the administration manual and other materials prepared by Brantwood for its accreditation application as evidence of the degree to which Brantwood treated the operations of its contractors as integrated into its own.

74. If Brantwood has transferred to the contractor sufficient control over the activities of the workers in question as to avoid either a finding that it remains their employer or a declaration under subsection 1(4) of the Act, then counsel for the complainant asks us to find that the transaction by which it did so was a "sale of business" to which section 63 of the Act applies. If any of these three findings is made, it follows that the employment of workers in these activities was and is governed by the terms of the collective agreement between CUPE and Brantwood, which obliged and obliges the relevant employer (whether Brantwood, contractor or both) to pay the specified wage rates and other benefits and respect established seniority rights in staffing jobs which were covered by the collective agreement when performed by employees of Brantwood.

75. Even if they have none of the aforesaid legal consequences, the arrangements between Brantwood and the contractors nevertheless constitute violations of the *Labour Relations Act* since, counsel argues, Brantwood was motivated by "anti-union animus" when it decided to make them, and CUPE asks that Brantwood be directed to discontinue them. If any of the complainant's arguments succeed, then the layoff of employees represented by CUPE was improper, and the remedies requested include a direction that the affected employees be reinstated with appropriate compensation.

76. Counsel for Brantwood and Med+Experts both characterize the arrangements in question as a "contracting out" of work to contractors who have assumed an employer's obligations with respect to, and exercise the control of an employer over, the workers who now perform functions formerly performed by employees of Brantwood. Counsel for Brantwood argues that in applying a "control" test to identify the real employer of the workers in question in this case, the Board should focus primarily on control over hiring, firing, discipline and scheduling. The ability to control the manner in which health care aides perform their work should not be given substantial weight in a case like this, he argues, because the manner of providing care in a nursing home is dictated by professional, industry and provincial regulatory standards to the extent it is not determined by the attending physician. Although total hours of health care aides' work supplied by Med+Experts is determined by Brantwood under their contract, that too is effectively determined by nursing home inspectors, counsel submits, so that the assignment of particular hours of work to particular individuals is the only significant scheduling decision over which control can be exercised by one or other of the parties to the contract.

77. Counsel for Brantwood and Med+Experts argue that weight should not be given to provisions in contracts or statements in manuals if the relationship they envisage is not what has occurred in practice. They say that the Board should focus on the actual exercise of control, just as it does in making determinations under subsection 1(3)(b) of the *Labour Relations Act*. Counsel submit that because Brantwood has not been directly involved in the hiring, firing, disciplining or scheduling of workers employed by either of the contractors and has not been involved in the direct supervision of their work or otherwise exercised control over them, it should not, therefore, be found to be their employer. Counsel deny that

compliance with the *Nursing Homes Act* and regulations thereunder requires that Brantwood retain an employer's control over workers in its home and, further, deny the Board has any jurisdiction to interpret that Act and those regulations to determine whether alleged non-compliance would have any particular consequence thereunder. They note that since the impugned arrangements began, Brantwood has been subject to a great number of inspections by Ministry of Health inspectors without any suggestion of non-compliance or threat of prosecution having been made as a result, and they ask the Board to infer therefrom that the Ministry of Health is content with the respondents' arrangements and considers them legitimate.

78. The respondents deny that either subsection 1(4) or section 63 of the *Labour Relations Act* can have any application to these facts. They say there cannot have been any sale of business within the meaning of section 63 because there has been no transfer or any business asset, however intangible. They argue that the language of subsection 1(4) requires that there be "common direction and control" of the respondent generally, not just of allegedly "associated or related activities or businesses." They say there is no such general control here. Counsel for Med+Experts submits that the co-ordinative planning and communication associated with subcontracting are insufficient to satisfy the test of "common direction and control", and says the arrangements here are analogous to the relationships between contractor and subcontractors on a construction site. He argues that subsection 1(4) can be applied only if all five of the factors referred to in *Walters Lithographing Company Limited*, *infra*, are present, including common ownership or financial control and common management which, he submits, are absent here. With respect both to the exercise of discretion under subsection 1(4) and the alleged violation of the *Labour Relations Act*, counsel for the respondents assert that, in the absence of an express restriction in any collective agreement by which he is bound, an employer has a *prima facie* right to "contract out" work. They say that the contracts here represent a *bona fide* exercise by Brantwood of that right, motivated solely by financial necessity and not at all by any feeling of vindictiveness toward CUPE. They deny that such a transaction can constitute an unfair labour practice, and argue that the financial necessity which led to Brantwood's contracting out work should be taken into account in any exercise of discretion under subsection 1(4) and should lead the Board not to make any declaration in these circumstances.

## Decision

79. This case requires us to focus on the scope of a trade union's rights as exclusive bargaining agent under the *Labour Relations Act* and the extent to which those rights and rights won in collective bargaining with an employer are protected under that Act from consequential or deliberate erosion when that employer changes the way it does business. The bargaining rights with which the *Labour Relations Act* is concerned arise either from certification or voluntary recognition. They are defined in a certificate or recognition clause as the right to act as exclusive bargaining agent for a generically defined bargaining unit of "employees" of a named "employer". If the *Labour Relations Act* left the scope of bargaining rights at that, however, a change in the legal identity of the employer, however artificial or inconsequential that change might be from a labour relations perspective, would deprive the employees in that bargaining unit and their exclusive bargaining agent of the accrued benefits of collective bargaining. The *Labour Relations Act* addresses that problem in section 63 and subsection 1(4). If an employer transfers to another legal entity the business in which the bargaining unit employees are engaged, section 63 of the Act extends the trade unions' bargaining agents'

bargaining rights to persons employed by the transferee in a like bargaining unit in the transferred business. In certain circumstances, subsection 1(4) of the Act gives the Board the discretion to treat two or more separate legal entities as a single employer for the purpose of defining or preserving the bargaining rights sought or held by a trade union. The application of these provisions does not require proof that the circumstances at hand result from a respondent employer's desire to evade its collective bargaining obligations, although this factor may well be relevant if it is present. Beyond the circumstances to which section 63 or subsection 1(4) may apply, the unfair labour practice provisions of the *Labour Relations Act* may be brought to bear to prevent a deliberate attempt to evade collective bargaining obligations.

80. Section 1(1)(i) of the *Labour Relations Act* defines "employee" as including a "dependent contractor", and subsection 1(3) deems certain persons not to be employees for the purposes of the Act, but the Act does not otherwise define "employee" or "employment". The courts, labour arbitrators, this Board and other adjudicators have had to assess whether one person is an "employee" of another in a wide variety of circumstances. Sometimes the question is whether an individual's relationship with another person is that of "employee" or "independent contractor". In others, the question is not whether an individual is an employee but, rather, which of two or more persons is the employer of an individual who is conceded to be someone's employee. The object of the inquiry may be to determine what obligations the parties to the alleged employment relationship owe one another, or it may be to determine whether the individual's putative employer will be liable to a third party for the negligence of the individual. The test and definitions which have been employed are, to some extent, a reflection of the circumstances in which they arose.

81. Older decisions hold that the difference between a contract of employment and a contract with an "independent contractor" for the performance of specified work lies in the employer's control over the manner of doing the work: see 25 Hals., 3rd ed., p. 452, quoted by Spence, J. in *Co-operators Ins. Ass'n v. Kearney* (1965), 48 D.L.R. (2d), 1 (S.C.C.) at pp 20-21. It was recognized that a person left to exercise discretion in determining how to perform work could be an employee. The focus of the test was on whether the putative employer was entitled to direct the manner of doing work and not just on whether and by whom such orders were actually given, as Lord Porter observed in *Harbour Board v. Coggins & Griffiths (Liverpool) Ltd., et al.* [1946] 2 All E.R. 345 (H.L.) at page 351:

... among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged....it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done.

The power to hire, the obligation to pay wages and the power to dismiss or suspend were also treated as indicia of a contract of employment but, as Lord Thankerton observed in *Short v. J. W. Henderson, Limited*, [1946] S.C. 24 (H.L.) at pages 33 and 34:

...a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right to the master in some reasonable sense to control the method of doing the work, and that this



factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

Lord Thankerton also observed that:

Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor, that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and to restate these *indicia*.

82. The limitations of the control test are aptly described in Hepple & O'Higgins, *Employment Law* Fourth Edition (Sweet & Maxwell, London, (1981)) at page 66:

The control test assumes that the employer is both a manager and a technical expert; in other words, it reflects a stage of society in which the employer could be expected to be superior to the employee in skill and knowledge. It is still a useful test when dealing with simple relationships such as those between a factory owner and an unskilled labourer, a craftsman and a journeyman or a householder and his domestic staff. However, as Professor Kahn-Freund has pointed out, "to say of the captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor-vehicle or of a crane that the employer 'controls' the performance of his work is unrealistic and almost grotesque." In these cases the employer is in no position to instruct the skilled worker *how* to do his job. Indeed, a skilled worker who simply relied on his employer's directions without exercising his own professional judgment might actually be in breach of his contract. It is no wonder, therefore, that the courts have found it increasingly difficult to apply the "control" test to modern industrial relationships.

...

(footnotes omitted)

The courts' response to these difficulties was described by Chief Justice MacKinnon in *Meyer v. J. P. Conrad Lavigne Ltd.*, (1980) 27 O.R. (2d) 129 (Ont. C.A.) at pages 132 and 133:

... The emphasis in the earlier authorities was on the extent of the "control" that the master had over the servant to determine whether there was, indeed, a master-and-servant relationship. The concept of this relationship has, however, been an evolving one, changing with the changes in economic views and conditions. As Lord Wright put it in the leading case of *Montreal v. Montreal Locomotive Works Ltd., et al.*, [1947] 1 D.L.R. 161 at p. 169, [1946] 3 W.W.R. 748: "In the more complex conditions of modern industry, more complicated tests have often to be applied." He postulated a fourfold test involving: (1) control, (2) ownership of the tools, (3) chance of profit, and (4) risk of loss. This test has been enlarged by the more recent "organization test" which was approved and applied by Spence, J., in *Cooperators Ins. Ass'n v. Kearney* (1964), 48 D.L.R. (2d) 1. In that case (pp. 22-3), he quoted with approval the following passage from Fleming, *The Law of Torts*, 2nd ed. (1961), at pp. 328-9:

"Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation [of the control test], and most recent cases display a discernible tendency to replace it by something like an 'organization' test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordination control as to 'where' and 'when' rather than the 'how'? [citing Lord Denning in *Stevenson, Jordan & Harrison Ltd., v. Macdonald*, [1952] 1 T.L.R. 101, 111.]"

Lord Denning in *Stevenson Jordan & Harrison, Ltd. v. MacDonald et al.*, [1952] 1 T.L.R. 101, referred to by Fleming, said this:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of

the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

83. This Board has often been called upon in certification applications to determine which of two or more entities is or are the employer or employers of employees for whom an applicant trade union seeks bargaining rights. The factors which had been considered in the number of cases in making such a determination were set out at paragraph 10 of the Board's decision in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645:

10. In determining which of two or more parties is or are the employer(s) of certain employees, the Board has applied a series of criteria which are listed below:

- (1) The party exercising direction and control over the employees performing the work. - See the *Municipality of Metropolitan Toronto* case, 61 CLLC 16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. 753, 761.
- (2) The party bearing the burden of remuneration. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. 487, 488; the *Beer Precast Concrete Limited* case, *supra*; the *Kel Truck Services Ltd.* case, 1972 CLLC 16,068; and the *Templet Services* case, [1974] OLRB Rep. 606, 608.
- (3) The party imposing the discipline. - See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. - See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party who is perceived to be the employer by the employees. - See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. - See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

These criteria, and the decisions from which they were derived, were examined at length in *Sutton Place Hotel* [1980] OLRB Rep. Oct. 1538. The Board observed that no one factor or combination of factors was ever decisive when they did not all point to a single one of the possible employers. The Board concluded that where the indications are mixed, it should be attempting to determine which of the possible employers exercises "fundamental control", a form of control which it distinguished from control over day-to-day activities:

43. The weight to be accorded the various indicia of employer status set out in *York Condominium* cannot be assigned in a vacuum. When one of the factors is combined with another in the hands of one company, the Board may conclude that they accurately identify the employer, though while standing alone or in some other combination they may not. The significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case. It is only then that the Board can decide which factors in the particular case most accurately reflect and identify the employer for collective bargaining purposes.

44. A particularly important question answerable through an evaluation of all of the

factors set out in *York Condominium* is who exercises fundamental control over the employees. In some cases control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases day-to-day supervision may suggest fundamental control, in others it may not. Similarly with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor listed in *York Condominium* inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of *The Labour Relations Act*.

84. Arbitrators dealing with disputes arising out of collective agreements are obliged to deal with issues of this kind when the grievance concerns the employer party's assignment of what the union party terms "bargaining unit work" to persons outside the bargaining unit, in what the employer party characterizes as the exercise of a *prima facie* right to "contract out" work. That "right", and its limitations, are described by Brown and Beatty in *Canadian Labour Arbitration*, 2nd ed. (Canada Law Book, Aurora, Ont., 1984) at pp 215-217:

A determination that certain tasks fall within the class of work normally performed by employees within the bargaining unit does not imply that the employees have a proprietary right to that work. To the contrary, in the absence of specific language in the collective agreement providing otherwise it is now universally accepted that bargaining unit work may be subcontracted to non-employees, provided that the subcontracting is genuine and not done in bad faith....

Of course, it is essential that the action taken, both in fact and law, be a legitimate contracting out. That is, the persons to whom the work is assigned must be independent contractors or the employees of independent firms.

(footnotes omitted)

85. When the trade union claims that the contracting out is not legitimate, in that the persons doing the work are not independent contractors or the employees of independent firms, arbitrators often begin with a recital of the "four-fold test" and then focus on "control". As Professor Schiff observed in *Riverdale Hospital*, (1974) 7 L.A.C. (2d) 40 at page 42:

As these awards reveal, in almost all arbitrations of grievances similar to that presented here, arbitrators have determined whether a person is the employee of the party-employer by weighing in the context of the particular situation the relative importance of four factors: the party-employer's control over the person's performance of the job, the ownership of the tools used, who has the chance of profit from the work, and who bears the risk of loss. In many arbitrations the last two factors have been unimportant while the factor of "control" has been decisive. To weigh the significance of control arbitrators have assessed the degree of the party-employer's right to direct the person's job performance appropriate to the nature of the particular job and the person's skill. In many awards, the party-employer did not choose the person, did not pay him directly and did not purport to discipline him on the spot. Nevertheless, arbitrators defined the person as an employee if he performed the job with the party-employer's materials on the party-employer's premises with the party-employer exercising to a substantial degree the right to direct the job performance.

86. Counsel cited a number of arbitration awards involving "contracting out", including: *Brantford Trailer & Body Ltd.*, (1968), 19 L.A.C. 92 (Hanrahan); *Consumers' Gas Co.* (1968), 19 L.A.C. 317 (Weatherill); *FMC of Canada Limited* August 21, 1976, (Weatherill); *Re Ford Motor Co. of Canada Ltd.* (1981), 1 L.A.C. (3d) 141 (MacDowell);



*The Corporation of the City of Peterborough*, June 15, 1983, (McLaren); *Firestone Canada Inc.*, February 20, 1984, (Lerner); *Preston Spring Gardens Retirement Home*, June 5, 1984, (Lerner); *The Royal Ontario Museum*, September 13, 1984 (Adams); and *Re Don Mills Foundation For Senior Citizens* (1984) 14 L.A.C. (3d) 385 (P. Picher). The result in each of those cases turned on the application to its particular facts of one or more of the various tests to which we have referred. It is not necessary to review those awards in any detail here. They are merely illustrative of the difficulty arbitrators face in “contracting out” cases of determining whether the party-employer or the contractor is to be regarded as the employer of workers supplied by the contractor for the purpose of interpreting and applying a collective agreement. In similar circumstances, the Board is not always limited, as arbitrators are, to an “either/or” choice. In *Sutton Place*, *supra*, the Board observed:

25. Where several entities have an impact on a group of employees, it is sometimes difficult to determine which entity is the employer for the purposes of the *Labour Relations Act*. In some instances, a party will apply under section 1(4) of the Act for a declaration that two or more entities carry on associated or related activities or businesses under common control or direction and that they constitute one employer for the purposes of the Act. When the Board determines that two or more such entities constitute one employer for the purposes of the Act, it is unnecessary to decide which between them is the employer of the employees in question . . . .

87. Both subsection 1(4) and section 63 of the Act extend the potential scope of bargaining rights. They are often pleaded in the alternative, as they were here. Section 63 of the *Labour Relations Act* provides, in part:

63. (1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

The effect of section 63 is that bargaining rights for unit of employees attached to the “business” in which they are employed, not just to the person who was the operator or owner of that business when those rights were acquired. The Legislature chose not to define the words

“sale” and “business” exhaustively, no doubt in recognition, as the Board noted in *The Charming Hostess Inc.*, [1982] OLRB Rep. Apr. 536 at paragraph 27, “... of the great variety of commercial relationships to which they might be applied, and the need for a case-by-case elaboration of the law in light of labor law policy.”

88. In interpreting the words “sale” and “business”, the Board does not place much reliance on the particular legal form adopted by the parties to a transaction. The focus of the Board’s attention is on the substance of the transaction and whether, from a labour relations perspective, it can be said that there has been some kind of transfer, whether direct or indirect, of something which may be fairly described as a “business”. In the wide variety of circumstances to which the application of section 63 has been sought, the Board’s primary difficulty is usually in determining what combination of assets, tangible or intangible, go to make up a business when they are assembled or reassembled, so that their transfer constitutes the transfer of a business or part of a business. As the Board observed in *Charming Hostess*, *supra*, at paragraph 29:

29. The term “business” is at the heart of section 63, but it is this concept which is the most difficult to define. One usually thinks of a business as a profit-making economic activity, but in the *Labour Relations Act*, the term cannot be so restricted. The Act applies to municipalities, public libraries, universities, school boards, hospitals, and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of “business” must be broad enough to include them. And in the case of undertakings in the service sector, such things as “know how”, managerial systems, and other intangibles may be much more important factors in the overall organization than a particular physical plant or configuration of asset. In *The Tatham Company Limited* [1980] OLRB Rep. March 366, the Board suggested the following approach:

“A business is a combination of physical assets and human initiative. It is an economic organization which, in a sense, is more than the sum of its parts. In *Raymond Cote* [1968] OLRB Rep. Mar. 1211, the Board put it this way:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is “the totality of the undertaking.” *The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit* to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.”

(emphasis added)

A business is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market - profitably, in the case of private sector enterprises but, in any event, efficiently. It is one harmonious whole consisting of many interrelated parts. From a labour relations perspective, however, the employer-employee relationships take on a special significance. From this viewpoint, the importance of the business is that it generates work for employees. The entrepreneurial activities of the business require it to enter the labour market as an employer and, this in turn, may give rise to the collective bargaining relationships to which The Labour Relations Act is directed. Section 55 preserves the stability of those established collective bargaining relationships if the business, or a coherent part of it, are transferred to a new owner.”

Almost without exception, a “business” involves more than just its employees or their work. As the Canada Labour Relations Board observed in *N.A.B.E.T. v. Radio CJYQ Ltd. et al*, (1978) 1 Can. L.R.B.R. 574:

... continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.

89. The potential application of section 63 (then section 55) to a “subcontracting” or “contracting out” were addressed in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at paragraph 37:

37. The present case involves a form of subcontracting, and subcontracting arrangements always involve the transfer of work. Work of services performed by A's employees within A's own organization are “contracted out” to B, and B uses his own managerial skills, plant, equipment and “know how” to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind of symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of “part of a business”) or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, “but for” the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of - A's business - albeit a part which A no longer wishes to operate itself.

90. One of the distinctions made in decisions concerned with whether a “contracting out” is a “sale of business” is whether the employer has disposed of a part of its business or whether it has merely engaged an agent to perform aspects of what continues to be the employer's business. This distinction was made in *Superior Sanitation Services Ltd.*, [1968] OLRB Rep. July 395, where the employer, a municipal corporation, contracted out garbage collection work to the respondent. The Board dismissed a claim by the union representing the municipality's garbage collection workers that section 63 applied to the transaction, holding that:

In the circumstances of this case the corporation has not disposed of part of its business but has merely changed its method of carrying on such business by contracting with an agent to perform the tasks which it formerly performed by with own employees.

The Board engaged in a similar analysis in an unreported decision of the Board cited by counsel for Brantwood: *Cosmos Building Maintenance*, Board File No. 0632-80-R. There the



Board concluded that a nursing home (Kennedy Lodge) had not transferred a part of its business when it contracted out housekeeping and laundry work to the respondent contractor, because the contractor was the employer's agent for the purpose of performing subfunctions still part of the employer's business:

Nothing, tangible or intangible, moved from Kennedy to Cosmos other than the janitorial and housekeeping work which is now performed by Cosmos employees rather than Kennedy employees. There has been no change in the scope of nature of Kennedy's business. *Kennedy has not disposed of a part of its business but has changed its method of accomplishing certain sub-functions in its business by relying on an agent to provide such services.* There has been no change in 'totality of the undertaking' which comprises the business. It is true that work formerly done by employees of Kennedy who are covered by a collective agreement, is now done by employees of Cosmos. That, in itself, in the total circumstances of this case cannot be construed as a sale of part of a business within the meaning of section 55.

(emphasis added)

The applicant in that case did not apply for a declaration under subsection 1(4).

91. In *Ontario 474619 Ltd.*, [1981] OLRB Rep. Oct. 1452, the applicant trade union was exclusive bargaining agent for employees of Hoco Limited in its motel, including those who worked in the motel's two restaurants. Hoco closed the restaurants, renovated them and entered into an agreement with the respondent which was described at paragraph 5 of the Board's decision:

...The respondent specifically agreed to provide all necessary staff including supervisory staff. In return Hoco agreed to pay the respondent the greater of 10% of the gross liquor sales or 49% of the net profit. Even though the management fee was to be in the form of a percentage of either sales or profits, all revenues are received by Hoco and the respondent's management fees are then paid out of those revenues. Hoco is responsible for all other management decisions; it establishes hours, prices and all other policy for the two establishments. It also retains ownership and control of the physical plant, having itself decided upon and paid for all renovations. The respondent, on the other hand, is responsible only for the hiring, firing and discipline of all employees. The respondent pays and supervises the employees. Two or three of the employees who previously worked part-time for Hoco now work for the respondent. All other employees in the Motel continue to be employed by the Motel and are covered by the collective agreement with the applicant union.

The trade union brought an application under section 63, but did not argue that Hoco remained the employer of restaurant employees or seek a declaration under subsection 1(4) of the Act. The Board found that the contract between Hoco and the respondent did not effect a sale of business. In doing so it hinted the result might have been different if the union had applied for a declaration under subsection 1(4):

22. In the instant case, the payment of the respondent of a percentage of the gross liquor sales or profits is not of itself conclusive that there has been a sale of a business or of part of a business. Provisions of that kind are common in commercial contracts, notably in leases, and do not of themselves evidence the sale of a business. In the instant case the conditioning of the revenues of the respondent on the volume of sales or profits gives it some share in the risk of profit and loss. That is an obvious incentive to better service and could be one of a number of indicia of a joint venture between the respondent and the Motor Hotel for the purposes of section 1(4) of the Act (an issue touched on further below). It does not, of itself, establish that part of a business has been transferred within the meaning of section 63 of the Act.

• • •

24. In this case there has been no transfer of any physical assets, much less the transfer in whole or in part of a “functional economic vehicle”. The Hotel is the sole decision maker as to what food and drink will be bought and sold. It alone decides the hours of business and the prices to be charged. The respondent would be powerless to prevent decisions by the Hotel in these areas which could materially affect the volume of sales or profits and thereby reduce or increase its revenues. Like the management company in *Metropolitan Parking Inc.*, the respondent has acquired an obligation to perform services for compensation. It would in our view be out of keeping with business reality and go beyond the contemplation of section 63 of the Act to conclude that by contracting to supply staff to the Motor Hotel’s restaurant and disco the respondent has acquired part of a business. To acquire the right to perform services in the restaurant and disco is not to acquire a going concern, in whole or in part. The segment so split off is not a going concern that can stand alone, as contrasted for example with the sale of one of a number of stores in a supermarket chain or the severance of the manufacturing and retailing arms of a previously integrated business. For the foregoing reasons the application must be dismissed.

25. It should be noted that the Board draws no conclusions with respect to what its decision would be if the same facts had been the subject of an application under section 1(4) of the Act (a refinement of the Act which did not exist at the time of the decisions in *Thorco* and *Aircraft Metal*). In light of evidence suggesting a relationship in the nature of a joint venture between the Motor Hotel and the respondent, including evidence that the president of the respondent is a director of the company that operates the Motor Hotel, the Board specifically asked counsel for the applicant whether he wished to plead section 1(4) in the alternative. He categorically declined to do so. Since section 1(4) on its face requires some form of application to the Board, we can say nothing more in respect of that alternative.

26. The Board also makes no comment on whether as a matter of law Hoco Ltd. continues to be the employer of the persons employed in the restaurant and disco. We have concluded that there has been no transfer of a business within the meaning of section 63. It may be that there has also been no transfer of the employment relationship having regard to the numerous factors that may bear on the question of who is the true employer (cf. *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538). On the limited evidence placed before the Board by the agreement of the parties, and no argument having been directed to that issue the Board can make no determination in that regard. That issue may, of course, fall to be determined in some further application or at arbitration.

## 92. Subsection 1(4) of the *Labour Relations Act* provides:

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or association or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The nature and purpose of subsection 1(4) were aptly described in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 at paragraph 12:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s)

through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure, nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 [now 63] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

In *Industrial-Mine Installations Limited*, [1972] OLRB Rep. Dec. 1029, the Board described the “mischief” it felt subsection 1(4) had been intended to cure:

9. Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

10. Prior to the enactment of section 1(4), where such situations, existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

11. Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

12. So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited et al*, [1971] OLRB Rep. July 406.

13. It is in these type of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted.

93. The effect of treating two or more legal entities as a single employer for the purposes of the *Labour Relations Act* is that they then jointly exercise the rights and jointly and severally bear the obligations of an employer under that Act and any applicable collective agreement with respect to a given bargaining unit of employees and their trade union bargaining agent. Subsection 1(4) requires that there be some connection between the entities before the Board may treat them as one. The required connection is defined in very general terms; there must be “associated or related activities or businesses” carried on by two or more entities “under common control or direction.” Obviously, the connection contemplated by these phrases is not limited to relationships of the sort that would be characterized at common law as a “partnership” (a legal characterization which, like “employment”, does not depend for



its application on the willingness of the parties to the subject relationship to so describe it), since partners are jointly and severally liable at common law for all obligations incurred by any one of them in respect of the partnership business. No special power to do so is needed in order to treat partners as effectively constituting one employer under the *Labour Relations Act* with respect to persons employed in the partnership business. More generally, it is clear that the “common direction and control” on which subsection 1(4) focuses is direction and control over businesses or activities, which may include control over employees but need not require it and should not, therefore, be confused with or limited to the control tests which would be applied in determining which of two respondents was the employer of particular employees at common law.

94. Another conclusion which can be drawn from the language chosen by the Legislature is that it did not intend the discretion to treat respondents as one employer to arise only where the connection between them is a relationship by blood, marriage, degrees of corporate ownership or a combination of these. Definitions with that limited perspective were and are quite common in taxation statutes, including the *Corporations Tax Act* in force in Ontario at the time subsection 1(4) was enacted. The Legislature’s avoidance of the language of taxation statutes or any other form of words with well-settled meaning must be treated as deliberate. It is apparent the Legislature thought it either impossible or unwise to define in advance any precise limit to the circumstances in which a discretion of this sort should arise, and preferred that the Board work this out on a case by case basis. This is particularly apparent from the use of the phrase “in the opinion of the Board,” which makes it clear that it is from the Board’s perspective as an administrative tribunal with expertise in labour relations that the meaning of such phrases as “associated or related activities or businesses” and “common control or direction” is to be assessed.

95. *Walters Lithographic Company Limited* [1971] OLRB Rep. July 406 contains the first statement by the Board of the criteria which then appeared to it to be relevant in making a determination under subsection 1(4):

21. The indicia or criteria which the Board considers relevant in making a determination as to whether the activities or businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are —(1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board’s determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesses the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each criterion on an individual basis.

We do not read this passage as suggesting, as counsel for Med+Experts argues, that all five indicia must be present before the discretion arises, and we do not accept the respondents’ argument that “common control or direction” can be found only where the entities under consideration have owners in common. The Board has repeatedly held to the contrary: *Evan-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176; *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436; *J.D.S. Investments*

*Limited*, [1981] OLRB Rep. Mar. 294; *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008; *Kennedy Lodge Inc.*, *supra*; and, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214. This Board has repeatedly recognized that subsection 1(4) can apply to a subcontracting relationship between two entities unconnected except by the terms of their contract. The Board put it this way in *Complete Car Care Centre*, [1983] OLRB Rep. Aug. 1293:

18. The Board has previously accepted the proposition that sub-contracting relationships can under certain circumstances bring two nominally independent firms within the ambit of section 1(4). As was stated in the *Charming Hostess* case [1982] OLRB Rep. April 582, the more closely a firm which has contracted out work controls when, where, how, by whom and at what place the work is to be done, the more the activities of the two firms will appear to be under joint control or direction. Indeed, the degree of control may be so great as to lead to the conclusion that the firm allegedly contracting-out certain work is in fact the true employer of the individuals performing it, and that they are not employees of the “sub-contractor” at all. See *K Mart Canada Limited*, [1983] OLRB Rep. May 649. In addition, a section 1(4) declaration may be appropriate in instances where a sub-contractor is effectively dominated by the firm letting out the work, and it appears the true purpose of the sub-contract was not to provide the dominant firm with independent managerial or employee skills, but rather to provide it with a separate “non-union” corporate vehicle with which it could continue performing the same work as before but outside of any collective bargaining obligations. See, *J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436.

(See also the Board’s recent decision dated November 29, 1985 in *Federated Building Maintenance Company Limited*, [1985] OLRB Rep. Nov. 1585.

96. The issues before us in this case arose in somewhat different circumstances in *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931. As we noted in paragraph 22 of this decision, that case was concerned with a contract made between Kennedy Lodge Inc., and Medox Health Care Services in November 1983, pursuant to which work formerly performed by health care aides employed at the Kennedy Lodge nursing home was to be performed by health care aides supplied by Medox. By the terms of that agreement, Medox agreed to supply Kennedy Lodge with “health care aides/nursing aides services” to be performed in accordance with accepted practices and standards and such written rules as the parties might agree. Kennedy Lodge was to specify the number of health care aides/nursing aides required from time to time, and undertook to pay Medox specified hourly rates for their services. The contract stipulated that Medox would:

Be responsible for providing the day-to-day supervision of health care aides/nursing aides at KENNEDY, it being understood that the control and direction of all MEDOX personnel in the employ of MEDOX shall at all times be the responsibility of MEDOX and that MEDOX shall be responsible for the discipline, scheduling or rescheduling of Medox personnel, and that KENNEDY personnel shall have no authority or responsibility for discipline, scheduling and rescheduling of MEDOX personnel, save only in a reporting function to the MEDOX supervisor.

The specified hourly rates expressly included the cost of a part-time staffing co-ordinator/supervisor who would be located at Kennedy Lodge for an unspecified minimum period of time each week. While the contract required Medox to ensure that its workers had appropriate credentials and were medically certified, the contract did not require that copies of the relevant certificates be provided to the nursing home, nor did it require that written evaluations of a worker’s job skills be performed at the time of hiring and made available to the nursing home. Medox was required to provide orientation to new workers, but the contract did not

contemplate or required the involvement of Kennedy Lodge in that orientation process. While the contract required that Kennedy Lodge personnel meet with Medox supervisory staff at regular intervals “to discuss staffing requirements, and to provide reports on services required, it did not provide for involvement by Kennedy’s director of nursing in the ongoing evaluation of workers supplied by Medox or require that copies of performance evaluations be supplied to Kennedy. Although Kennedy was permitted to terminate the contract on 30 days written notice, the contract did not give it “final approval as to whether or not staff supplied by the Contractor are suitable”, or expressly require that Medox immediately replace any staff member deemed not to be suitable by Kennedy. The Medox contract did not stipulate that the function of the part-time staffing co/ordinator/supervisor would be “to ensure that the director of nurses are complied with, and that the policies and procedures of the Home are complied with ...”. The Medox/Kennedy contract contained no express reference to Kennedy’s director of nurses or to the *Nursing Homes Act*, and did not stipulate that “the director of nurses shall at all times have overriding authority and jurisdiction as required by the Act.” In short, the terms of the contract between Kennedy and Medox were different from those of the contract between Brantwood and Med+Experts in this case.

97. As we also noted earlier, the contract between Medox and Kennedy Lodge had not been implemented when the Board considered it. A good deal of the focus of the Board’s hearing in *Kennedy Lodge Inc.* was on how the parties to the Kennedy/Medox contract anticipated that it would actually be performed. They agreed that the procedures to be followed and the standards to be met by the aides supplied by Medox would be laid down by Kennedy Lodge. Personnel records for the aides would be kept in the home because of the requirements of the *Nursing Homes Act*, but would be maintained by Medox. Kennedy said it expected Medox to provide on-site supervision eight hours per day and on an “on call” basis for the rest of each day. The administrator of Kennedy Lodge expected that Medox would “get rid of” any health care aide Kennedy Lodge was not happy with, and the national marketing manager for Medox confirmed that would be its response. The Board’s decision does not expressly state what qualifications the parties expected that the Medox supervisor would have, other than what might be inferred from the contractual requirement that the supervisor conduct job evaluation, hands-on training and in-service programs.

98. The majority of the Board in *Kennedy Lodge Inc.* chose first to determine who would be the employer of the nurses aides supplied by Medox. It reviewed Board and arbitral jurisprudence dealing with the matters which we have reviewed in paragraphs 81 to 85 of this decision. Applying principles derived from the jurisprudence, the majority found that Kennedy Lodge would be the employer of health care/aides nursing aides supplied by Medox. Their reasoning is set out in paragraphs 49 to 51 of their decision:

49. The work in dispute is hands-on nursing care which is the core activity of Kennedy Lodge and has heretofore been performed by nurse’s aides employed by Kennedy Lodge under its collective agreement with the union. Where the nurse’s aides form a part of the health care team (see regulations under the *Nursing Home Act* and the Kennedy Lodge job descriptions) and where their function is to provide hands-on nursing care in the form of bathing, grooming, feeding, walking etc., we do not accept that a meaningful differentiation can be made between control over nursing care generally and control over the employment of the nurse’s aides who provide an important part of this nursing care, as it appears has been attempted in the contract between Medox and Kennedy Lodge. The task that falls to the Board is to assess the substance of the arrangement, as distinct from its form, as it will be carried out within the Kennedy Lodge premises and against the backdrop of the existing collective bargaining relationship.



50. The aides employed by Kennedy Lodge have been subject to the policies and procedures laid down by Kennedy Lodge in the running of its Home and have been directly supervised by charge nurses (on a 4.5 to 1 ratio) in the employ of Kennedy Lodge. On the evidence, the Kennedy Lodge organization, including all of the charge nurses, the nursing supervisors and the Director of Nursing, will remain intact except for the replacement of the 92 nurse's aides who are presently employed by 92 nurse's aides from outside and a single on-site supervisor. Furthermore, on the evidence, Kennedy Lodge will continue to establish policies and procedures under which nursing care is provided in the Home - the same resident care policies and procedures under which the aides provided by Medox will work. Kennedy Lodge, in compliance with the *Nursing Homes Act*, will continue to determine the number of aides required within the Home. Finally, on the evidence of Messrs. Daynes and Butler it is clear that Kennedy Lodge will continue to enjoy the ultimate authority with respect to having any unsatisfactory aide removed from Kennedy Lodge. The authority of Medox to reassign an aide found unsatisfactory by Kennedy Lodge is irrelevant to our determination. The aides supplied by Medox will continue to be under the direct supervision of the Kennedy Lodge charge nurse who will continue to make reports, prepare the care plans for each patient and monitor the day-to-day work of the aides. Indeed, it is acknowledged that it is the charge nurses who will report any occurrences involving a Medox aide to the Medox supervisor. Furthermore, under regulations 60(1)(a) and (b) the Director of Nurses, who is a Kennedy Lodge employee, is responsible for "the organization, direction and evaluation of nursing care" and "directing the work of the nursing staff in the nursing home". In the context of an arrangement under which the Kennedy Lodge organization will remain intact, under which Kennedy Lodge, through its charge nurses, will continue to provide direct supervision to the aides and will maintain overriding authority in the form of its power to make the policies and procedures under which the aides will work and to have any unsatisfactory aide removed from Kennedy Lodge, we do not attach a great deal of significance to the role played by the Medox supervisor. Indeed, it is not physically possible for a single person to provide direct hands-on supervision over the 92 aides working in the home and, as we have observed, under the regulations ultimate authority rests with the Kennedy Lodge Director of Nursing. Finally, under the terms of an arrangement that requires payment by Kennedy Lodge on the basis of the number of hours worked by the aides in the Home, we must conclude that Kennedy Lodge continues to bear the burden of the remuneration in respect of the aides supplied by Medox.

51. Applying the primary test developed in both the Board and the arbitral jurisprudence, and relying on substance over form, we are satisfied that Kennedy Lodge will maintain "fundamental control" over the employment of the aides working at the Kennedy Lodge Nursing Home. Indeed, given the nature of Kennedy Lodge's business, the care of the elderly, and the regulations which govern it, it would be difficult to conceive of circumstances under which the employment of persons providing any part of the hands-on care of patients carried on in the Home would not be under the fundamental control of the owner of the Home. The fact that many of the functions performed by the nurse's aides are routine in nature does not detract from the importance to be attached to the identification of who provides direct supervision of and maintains ultimate authority over those who provide this hands-on care. In this case the evidence points conclusively to Kennedy Lodge and accordingly, we hereby find (in contrast to the finding made in *Re Preston Springs Gardens Retirement Home and Health Office and Professional Employees Local 206* (June 5, 1984), unreported, (Lerner)) that Kennedy Lodge would be the employer of these aides and that the arrangement with Medox is not a contracting out within the meaning of article 2.03 of the collective agreement. In these circumstances an attempt to employ outside aides in preference to those with established seniority rights under the subsisting collective agreement with the applicant/complainant trade union, would constitute a serious breach of the collective agreement and of sections 50 and 64 of the Act and we hereby so find.

99. The majority in *Kennedy Lodge Inc.* then went on to analyse the potential application to the circumstances before it of subsection 1(4) of the Act. It rejected an argument that subsection 1(4) could not be applied because the entities involved, Kennedy Lodge and Medox, were not generally under "common control and direction". It concluded that the prerequisite

of “common control or direction” would be satisfied under subsection 1(4) if there was common direction or control of the entities’ “related activities or businesses”. The majority reviewed the provisions of subsection 1(4), the general principles set out in the Board’s jurisprudence and two cases relied upon by the respondents: *Charming Hostess, supra*, and *Complete Car Care Centre, supra*. It concluded that the pre-conditions to the exercise of discretion under subsection 1(4) were present in the facts before it, and that a declaration should issue in the exercise of that discretion:

56. In contrast to the two cases referred to above, the activities with which we are concerned in this case form part of the core activity of Kennedy Lodge. It is one thing to contract out the performance of peripheral activities (a hospitality suite where brewing is the core activity) or the washing and rustproofing of automobiles where the selling of cars is the core activity) over which fundamental control can be easily relinquished, as it was in those cases. It is much more difficult to relinquish fundamental control over the core activities of the business. If we are somehow mistaken in our conclusion that Kennedy Lodge retained fundamental control over the nursing activities carried out by the aides, then, at the very least, the evidence establishes that Kennedy Lodge and Medox share control over these activities, as they are carried on as part of Kennedy Lodge’s business. The contract between Kennedy and Medox contemplates that there will be a significant degree of common control and direction, and, in addition, the policies and procedures laid down by Kennedy, the ongoing consultation between Kennedy and Medox and the conditions laid down in the regulations to the *Nursing Home Act* leave no doubt that the activity of Medox in supplying nursing aides to Kennedy Lodge and the activity of Kennedy Lodge in providing nursing care for its residents are related activities within the meaning of section 1(4) of the Act and are under common control within the meaning of the same section.

57. In deciding whether or not to exercise our discretion under section 1(4) of the Act, we are guided by the words of the Board in *Re Rivard Mechanical, supra*:

8. The first point to be commented on, in the above facts, is the extent of the emphasis placed by the respondents on the fact that what occurred here arose solely as a matter of economic survival. While the Board is not insensitive to such problems, it must be stated unequivocally that the *Labour Relations Act* nevertheless does not contemplate or permit the unilateral withdrawal by one party from its obligations under the Act, or the achievement of this end simply by choosing to carry on the same business in a different form. Indeed, the provisions of section 1(4) in particular were designed to eliminate such action. While the Board is given an important measure of discretion under section 1(4), to exercise that discretion on the basis that an employer party was unable to fulfill its legal obligations on a competitive basis would undermine the scheme of the Act, and the very provisions of section 1(4) itself. Counsel for Rivard Mechanical argues: ‘There is no intent to interfere with the union but economic realities require that they must maintain a non-union operation’. Clearly nothing is more fundamentally destructive of a union’s rights and interests than operating non-union, and ‘economic realities’ simply cannot be used to justify this.

The evidence supports the conclusion that the arrangement with Medox was entered into for no other reason than to allow Kennedy to replace its unionized employees with non-union employees and thereby to extricate itself from its collective bargaining obligations in respect of its aides and to thereby avoid having to pay the wages and benefits under the collective agreement. Indeed Mr. Daynes acknowledged as much. In these circumstances, a section 1(4) declaration is in order and accordingly, we hereby declare that Kennedy Lodge and Medox, a division of Drake International, are related employers within the meaning of the Act in respect of the activities carried on by the nursing aides at the Kennedy Lodge Nursing Home over which they share common control...

100. In *Kennedy Lodge Inc., supra*, the majority began by determining whether Kennedy Lodge was the employer of the health care aides supplied by Medox, and then considered

whether it could or should declare Kennedy Lodge and Medox to be one employer under subsection 1(4) of the Act. While we agree that factors relevant to both issues have to be examined in tandem, we feel the first questions which should be addressed are those relating to the application of subsection 1(4).

101. When the application of subsection 1(4) is in issue, the Board is concerned with the definition or potential redefinition of a continuing collective bargaining relationship, not with the assignment of vicarious liability for an occasion of negligence, nor solely with the interpretation and application of the language of a collective agreement. If there is a serious debate over which of two entities is the employer of persons who are conceded to be someone's employees, that will be because some of the important attributes of an employer can be seen in each of them. When each of the entities appear to have a real stake in and influence on matters of relevance to the labour relations of employees in a bargaining unit, then even from their perspective it may make sense to treat them both as the employer for labour relations purposes than to choose between them and designate one as employer for labour relations purposes to the exclusion of the other, who might for other purposes be treated as employer. The possibility that a choice is unnecessary or inappropriate should be considered before the choice is made.

102. It is important to observe that, in determining whether to declare that two distinct legal entities constitute one employer for the purposes of the *Labour Relations Act*, the question whether the discretion to do so exists in the circumstances at hand and the question whether such a declaration ought to be made in those circumstances are two distinct questions. Accordingly, it is not particularly helpful to test the reasonableness of a proposed interpretation of the phrases "associated or related activities or businesses" and "common control or direction" by asking whether that interpretation could embrace circumstances in which a declaration ought not to be made. In giving the Board a discretion whether to make or not make a declaration when the preconditions it specified had been made out, the Legislature recognized that there could well be circumstances in which "associated or related activities or businesses" are carried on by two entities "under common control or direction" without there being any valid labour relations reason for treating the two entities as constituting one employer for the purposes of the Act. Thus, we can accept the proposition that the degree and nature of the control and direction which a standard form construction contract permits a contractor to exercise on a construction project over an otherwise independent subcontractor would not ordinarily warrant making a declaration that the contractor and subcontractor are one employer for the purposes of the *Labour Relations Act*, without having to accept also the argument that the parties to such a relationship are not "under common direction or control" as those words are used in subsection 1(4). Apart altogether from the fact that the contracts with which we are concerned here contain provisions which are not found in standard construction contracts and which do play a significant part in our analysis, the suggested analogy with the usual contractual hierarchy on a "typical" construction project is inapt, if only because it does not take into account the collective bargaining relationships which typically co-exist with that contractual hierarchy and which typically make it either unnecessary or inappropriate from a labour relations perspective to treat contractors and their subcontractors as one employer for the purposes of the Act.

103. Having observed that the existence and proper exercise of the subsection 1(4) discretion in any particular circumstances are two distinct questions, it is also important to observe that these questions are closely related. The nature of the relationship between the



target entities is relevant to both questions. A negative answer to either question is dispositive. A decision not to grant a declaration may well turn on considerations which go beyond whether there are “associated or related activities or businesses” carried on under “common control or direction”. Reasons given for such a decision may discuss factors which affect the existence of the discretion and factors which affect only its exercise without distinguishing between the two, because it was thought not strictly speaking necessary, and perhaps not desirable, to do so. Paragraph 19 of the decision in *Complete Car Care Centre, supra*, is an example of this. The decision in *Charming Hostess Inc., supra*, is a good example of a decision which clearly turned on considerations which went solely to the exercise of the discretion, making it unnecessary to resolve with finality the argument about whether the circumstances there gave rise to a discretion under subsection 1(4).

104. The right or power to exercise control or direction over the activities of a legal entity can arise as easily from the terms of a contract as from the legal incidents of ownership. The language of subsection 1(4) does not distinguish among the means by or through which direction or control may arise or be exercised. We are satisfied that “common control or direction” as contemplated by subsection 1(4) can be the result of a contractual relationship even if there is no other connection between the parties to that relationship.

105. The respondents argue that a discretion under subsection 1(4) arises only when the entities in question are themselves under common direction and control, and not just when certain of their activities are under common direction and control. The syntax of subsection 1(4) does not favour either construction; the phrase “under common control or direction” can be taken to modify either the words “carried on” or the list of types of entity. The distinction is only important if “common control or direction” can only exist when there is total control or direction; otherwise, when two entities carry on certain activities under “common control or direction”, it can be said that the two entities are “under common control or direction” to that extent. There is no reason to suppose that the Legislature meant “total control or direction” when it said “common control or direction”. The focus of subsection 1(4) is on circumstances “where, in the opinion of the Board, associated or related activities are carried on ...” by two or more entities. Having regard to that focus, the fact that the subject entities may also engage in other activities, while potentially relevant to the exercise of the discretion conferred by subsection 1(4), does not in our view affect the existence of that discretion. Thus, the discretion to treat an employer and its subcontractor as one employer with respect to the subcontracted work can arise even if the subcontractor does other work and has other customers. The mere existence of the discretion does not, of course, dictate that it be exercised in a particular way.

106. Turning to the facts of this case, in our opinion Brantwood’s nursing home business and the activities of persons engaged by Med+Experts to work at Brantwood are clearly “associated or related activities or businesses” within the meaning of subsection 1(4), and the same can be said of Brantwood’s nursing home business and the activities of persons engaged by Hallmark to work at Brantwood. In each case, this is so from two perspectives. One is that the activities which they now carry on simultaneously are associated or related. The other is that the activities of the workers provided by the contractor are related to (indeed, substantially identical to) activities in which Brantwood personnel were engaged before the contractor’s contract with Brantwood came into effect. Each of these propositions is sufficiently self-evident on the facts as to warrant no further explanation. It is also our opinion that these activities are carried on by Brantwood and Med+Experts, and by Brantwood and Hallmark,

under “common direction or control” in each case. The common element is the control and direction over the activities of the contractors and persons they have engaged to work at Brantwood which Brantwood has by virtue of its arrangements with those contractors.

107. By the express terms of its written contract with Med+Experts for the supply and supervision of health care aides/nurses aides (hereafter referred to simply as “aides”), Brantwood controls the number of aides “employed” by Med+Experts at Brantwood. The contract gives Brantwood control over the criteria used in the initial hiring of aides and in the on-going evaluation of aides hired. It gives Brantwood’s management access to all employee records, the right to participate actively in employee evaluations, the right to influence the orientation and training of aides and the right to determine the suitability of individual aides, including the right to require the permanent removal of any aide from the nursing home. Brantwood is entitled to dictate the procedures each aide must follow in performing her work. This work is performed on premises controlled by Brantwood. To the extent “tools” are required, these are supplied by Brantwood. While Med+Experts is free to determine what wages are paid to aides, it can only increase wages at the expense of its profit; it cannot, for instance, rearrange the work it has contracted to perform so as to employ a smaller number of more productive workers at a higher wage and still maintain its revenues and profit, because payment under its contract is tied to hours worked, not performance or “results.” Having regard to the terms of this contract, if Med+Experts were an individual and not a corporation, there might be a serious question whether it was an employee of Brantwood, at least for the purposes of the *Employment Standards Act*: see, for example, *Re Becker Milk Co. Ltd.*, (1972) 1 L.A.C. (2) 337 (Carter), judicial review denied (1974) 1 O.R. (2d) 739 (Ont. Div. Ct.); and, *R. v. Mac’s Milk Ltd.*, (1973) 40 D.L.R. (3d) 714 (Alta C.A.).

108. The respondents say we should not give weight to things written in their contracts and manuals concerning matters which have not actually occurred. In particular, they say we should give no weight to the fact that certain rights are reserved to Brantwood under its contract with Med+Experts, if those rights have not actually been exercised. Their attempted analogy with the Board’s approach to managerial exclusion issues arising under subsection 1(3)(b) of the Act is inapt and unpersuasive. That subsection is not concerned with identification of “the employer” but rather with identification of those of its employees whose functions require their exclusion from a bargaining unit. It is true that in determining whether an employee crosses the line between worker and first line manager the Board focuses, as the subsection requires, on whether the individual in question *actually* exercises the functions of a first line manager. Those are not the only functions which may put an individual on the “managerial” or “employer” side of the line. Those above the “first line” in the managerial hierarchy are also managerial, and this is so even if they have delegated the hiring, firing, promotion, demotion and discipline of workers to their subordinates. When searching for the origin of control over a worker’s employment, whether for the purpose of identifying the common law employer or for the purpose of determining the issues which arise in an application under subsection 1(4), it *is* relevant and important to ask who ultimately has the right to give orders, and not just who actually gives them or whether it is usually necessary to give any.

109. In any event, the respondents, and Brantwood in particular, have not treated their written contract as meaningless. They have shown it to representatives of the Ministry of Health. They have included it in the material shown to the accreditation surveyor. They say they also told those people all the other things we heard in evidence. They did not testify that

the contract they signed in January 1984 has been cancelled and replaced with something else; we must assume they did not say that to those others. While we do not need to decide whether Brantwood is or is not in compliance with the provisions of the *Nursing Homes Act* and regulations, we cannot ignore its provisions. The existence of those provisions is a significant part of the context in which the parties framed their contract and would later have made representations to others about its effect. Whether or not those provisions require that a nursing home licensee have any particular legal relationship with those who provide hands-on nursing care in its home, it would be apparent to any lay reader of that Act and the regulations thereunder that the licensee is ultimately answerable for what takes place in the home, as the continuation of its license may depend on its being able to ensure that work in its home is performed to certain standards. Mr. Hallatt testified that he was concerned about the requirements of the *Nursing Homes Act* when he reviewed Med+Experts' draft contract. It is apparent that the draftsman of the contract was acutely aware of the provisions of that Act. We are not prepared to accept any suggestion that either of the parties was unaware of the nature and degree of control which the contract gave Brantwood and its Director of Nursing over the activities of Med+Experts' personnel or that they did not intend Brantwood and its Director of Nursing to have the *right* to exercise such overriding authority and ultimate control. It may well be that they did not expect that that right would have to be exercised often. That does not change the significance of the terms of the contract to the question at hand.

110. In *Kennedy Lodge Inc.*, the majority decision stressed the fact that the R.N.A.'s and R.N.'s from whom Medox aides would take direction with respect to their day-to-day work all continued to be employed by Kennedy Lodge. The respondents here place great emphasis on the fact that Med+Experts also supplies some of the R.N.A.'s and R.N.'s who work at Brantwood, and that one of these is vested with what we would call "labour relations authority" for aides whenever the regular Med+Experts on-site supervisor is not present. In the circumstances, that is not a significant distinction. Of what little the evidence discloses about the terms on which Med+Experts supplies R.N.'s and R.N.A.'s to Brantwood, the most significant features are the job descriptions referred to in paragraph 61 hereof, which were not repudiated by the respondents. While she is to report to Med+Experts' supervisory staff on matters of a labour relations nature, a Med+Experts R.N.A. is to report to the Registered Nurse on matters involving patient care. The R.N. may be a direct employee of Brantwood, she may be supplied by Reimer or she may be supplied by Med+Experts. The R.N. which Brantwood acknowledges as being its employee reports to Brantwood's Director of Nursing in all matters, including patient care. Having regard to Brantwood's administration manual, and in the absence of evidence that Reimer provides any direct supervision of the R.N.'s it supplies, we conclude that those R.N.'s also report directly to Brantwood's Director of Nursing with respect to patient care. Even an R.N. supplied by Med+Experts reports to Brantwood's Director of Nursing on all matters related to patient care, according to Med+Experts' own written description of the R.N. position. Thus, in matters involving patient care, Brantwood's Director of Nurses directly supervises all *registered* staff, including any Med+Experts "acting supervisor". Paragraph 22 of the parties' contract requires Med+Experts' on-site supervisor to ensure that directives of the director of nurses are carried out by the aides it supplies. Med+Experts acknowledges that an aide it supplied would accept direction from Brantwood registered staff in an emergency or if the orders given were "reasonable". We do not believe that a nurses aide who valued her employment at Brantwood's nursing home would lightly enter into a debate with an on-site R.N. or R.N.A. about the reasonableness of her order, no matter whom the aide understood the nominal employer of the R.N. or R.N.A. to be.

111. The materials Brantwood prepared for its accreditation application represented its



activities and those of its contractors as a single fully integrated operation. The nursing care, laundry and housekeeping functions were and are each still very much a part of Brantwood's business. We agree with counsel for the respondents that Brantwood has not transferred any of those parts of its business to the contractors; both contractors are merely agents of Brantwood for the purposes of supplying, supervising and administering the employment relations of persons working in what remain parts of Brantwood's business. The manuals presented to the accreditation surveyor show clearly how little the operation of that business has changed as a result of these contracts. The respondents say that the manuals are inaccurate in a number of respects apparently critical to the issues in this case. The most telling comment on the real significance of those discrepancies came in Mrs. Hallatt's attempt to explain how they could be present in the manual when the very sections in question had been reviewed and revised months after the "contracting out" took effect. She said it was because her assistant administrator had not gone over the manual "with a fine-tooth comb." The changes brought about by "contracting out" could not have been very significant from the point of view of day-to-day administration of Brantwood's nursing home if its assistant administrator needed a fine-tooth comb to detect them.

112. It is not suggested that there was any work related difficulty with the workers displaced by this "contracting out" nor, for that matter, with any member of Brantwood's management, and no supervisor outside CUPE's bargaining unit became redundant as a result. Brantwood's sole and acknowledged purpose in contracting out the work in question was to avoid the wage rates it was obliged to pay under its agreement with CUPE. We accept that this was for "financial reasons". It is unnecessary for us to assess the relative extents to which Brantwood's cash flow problems were the result of misfortune and mismanagement, or whether they were unavoidable, or whether reduction of labour costs was the only solution possible. We do not consider Brantwood's financial situation a relevant consideration in the exercise of our discretion under subsection 1(4), for reasons set out by the majority in *Kennedy Lodge Inc.*, *supra*, at paragraph 57 (reproduced at paragraph 99 of this decision.)

113. In his dissent, our colleague refers to the fact that Article 8.05(b) of the collective agreement between Brantwood and CUPE contemplates Brantwood's "sub-contracting" work done by members of the bargaining unit. He says it is a recognized fact that "sub-contracting" or "contracting out" of work in nursing homes is an "acceptable practice." He concludes that all kitchen, housekeeping, laundry and maintenance work in the nursing home "can clearly be sub-contracted in the whole or in part." With great respect, these observations obscure the issues before us. It is not at issue whether Brantwood has a contractual right to "subcontract", nor whether "sub-contracting" or "contracting out" are generally "acceptable" in the nursing home context. From the perspective of a grievance arbitrator, as we have already noted, the issue would have been whether the contract at hand genuinely transfers work to independent contractors or the employees of independent firms. Put another way, the issue would be whether the contract at hand really is a "sub" or "out" contract. When that is the issue, the words "subcontract" and "contract out" are not neutral labels, and this no doubt accounts for the use in cases of this kind of the phrase "contract in" by way of semantic counterpoint. Obviously, an employer cannot contract "out" to itself, so the existence of a collective agreement right to "contract out" can hardly be dispositive of the real issues raised by an application to this Board under subsection 1(4). Put another way, the question in an application under subsection 1(4) is not whether Brantwood "can" make a "sub" or "out" contract for the performance of work, but whether a particular contractual relationship attracts a declaration under subsection 1(4). This distinction will perhaps be more obvious with reference to the

issue with which section 63 of the Act is concerned. It would be a rare collective agreement that expressly prohibited an employer's selling all or a part of his business, and in the absence of such an express prohibition it could be said that the employer had a "right" to sell his business. There would be no debate about whether sales of businesses were "acceptable". It would not follow, however, that the sale of that business would be free of consequence to the participants under section 63 of the *Labour Relations Act*. Again, the important question is not whether the employer "can" engage in a transaction, but whether some provision of the Act will apply when he does. The issue with which we are dealing here is not some abstract question whether a contract could be devised by which a nursing home operator bound by a collective agreement could transfer work heretofore performed by its own employees "out" to other workers without breaching either the collective agreement, the *Labour Relations Act* or the *Nursing Homes Act* and without engaging in a "sale of business" as defined by section 63 of the Act or attracting a declaration under subsection 1(4) of the Act. The issues before us in this case only require an assessment of the consequences under the *Labour Relations Act* of Brantwood's having entered into the particular contracts it actually made with Hallmark and Med+Experts.

114. In our view, the circumstances of Brantwood's contractual relationship with Med+Experts very clearly warrant a declaration that they constitute one employer for the purposes of the *Labour Relations Act* with respect to persons engaged by Med+Experts to work at Brantwood's nursing home. In his dissent in *Kennedy Lodge Inc.*, *supra*, our colleague wrote that subsection 1(4) "is only concerned with common control or direction over employers' labour relations, and not necessarily with control and direction of the methods used by a subcontractor to perform services required under a subcontract" and that the different results in *Charming Hostess* and *Complete Care Care Centre* on the one hand and *J. H. Normick* on the other could stand together because, in his view, "they rest on the degree of control over the *labour relations* of the subcontractor." While we do not accept that subsection 1(4) is *only* concerned with common control or direction over employers' labour relations, common control and direction over labour relations is sufficient to give rise to the discretion under subsection 1(4), and Brantwood shares with Med+Experts substantial control over a great many aspects of the latter's labour relations with those who it sends to work at Brantwood. Critical to the exercise of discretion under subsection 1(4) is the presence or absence of mischief of a sort to which the enactment of subsection 1(4) was directed. Such mischief is clearly present here.

115. Brantwood has not so much transferred a function "out" to another organization as it has brought another entity *into* its own organization to assist in the immediate supervision of a function which remains under Brantwood's ultimate control and continues to be performed on the same premises as before, in substantially the same manner as before by persons with similar skills as those who performed it before. From a labour relations perspective, the enterprise now operated in an integrated fashion by Brantwood and Med+Experts is in substance the enterprise which was being operated by Brantwood alone when CUPE acquired the right to represent persons employed by Brantwood in that enterprise. Portions of what might be described as the personnel and first line supervision functions in that enterprise are now performed by Med+Experts, over which Brantwood has authority which, from a labour relations perspective, is similar to that typically possessed by the senior management of any enterprise in relation to those who perform personnel and first line supervision functions within the enterprise they manage. Not surprisingly, senior management does not often involve itself on a day-to-day basis in matters which are the province of the personnel department and first



line supervisors. The personnel department deals with hiring, firing and discipline of workers and the first line supervisors deal with their day-to-day supervision. But for Brantwood's having placed these personnel and first line supervision functions within a separate corporate form which has been made the paymaster of those workers, however, the personnel department and first line supervisors would not be mistaken for "the employer" to the exclusion of senior management. By exercising our discretion under subsection 1(4) we preserve the labour relations *status quo* by attaching the bargaining and collective agreement rights of the union to what is in substance the enterprise in respect of which those rights were acquired.

116. Most of the evidence and argument in this case concerned the agreement between Brantwood and Med+Experts, in large part because Hallmark chose not to defend these applications and the applicant did not seek enforcement of Hallmark's obligation under subsection 1(5) to adduce evidence. Both the subject matter and the terms of the Hallmark contract are different from those of the Med+Experts contract. However, on close analysis the two arrangements share several important characteristics. There are the factors we referred to in paragraph 111: the clear indication from its manuals that Brantwood considered Hallmark's activities fully integrated with its own, and the "mistakes" in the manual which show how little impression was made on Brantwood's administration by the changes they now say were effected by these arrangements. Although Hallmark's contract price is not expressly quoted on a "per hour" basis, from the format of the three pages on which individual quotations for housekeeping, laundry and maintenance services are found, it might be argued that the contract commits Hallmark to supply a number of hours of work and not just to performance in accordance with a quality standard. The subject work is performed on Brantwood's premises. While some of the equipment used is supplied by Hallmark, a good deal of it, including laundry facilities, belongs to Brantwood. The work performed by persons supplied by Hallmark is the same kind of work that bargaining unit employees performed before the "contracting out"; there is nothing significantly different about the way it is now performed. The sole and acknowledged reason for "contracting out" the laundry and housekeeping work was to avoid the wage rates in the collective agreement by which Brantwood was bound.

117. These factors might not have been enough to attract the serious prospect of a declaration under subsection 1(4) if it were not for this last factor: in the quotation Brantwood accepted, Hallmark said of the personnel it would supply that "... at any time your administration can make suggestions *and changes* in such matters as discipline staff handling, hiring and firing" (emphasis added). We do not find any ambiguity in these words, from which we find that Hallmark conferred on Brantwood substantial control over important aspects of the labour relations of the workers it would supply. We do not find that conclusion inconsistent with the provision which prohibits Brantwood from luring away from Hallmark the persons who supervise those workers, particularly not when the words we have quoted appear in a paragraph which begins with the words "Personnel can either remain on your payroll or that of Hallmark Housekeeping." Indeed, the provision to which our colleague draws attention is not unlike the terms on which personnel placement agencies routinely insist when supplying skilled workers on a temporary basis and only serves to emphasize the nature of the function actually being performed by Hallmark. The message of that provision is not so much "keep your hands off my people" as "keep your hands off the markup on their salaries which we have earned by finding and training them."

118. Mrs. Hallatt testified that she did not recall reading the provisions we have quoted when she reviewed Hallmark's quotation. In all the circumstances, it seems most unlikely that



she would not have read everything that appeared on a page entitled “ADVANTAGES OF USING HALLMARK HOUSEKEEPING SERVICES INC.” We are satisfied that she did read that page and in doing so read the passage in question. We are satisfied Mrs. Hallatt would have understood what those words meant when she read them. If she does not remember reading the provision, that must be because when she read it, it did not strike her as unusual or inconsistent with what she was looking for. Indeed, we believe that she would have regarded that provision as a desirable, perhaps even expected, feature, and a similar belief no doubt led Hallmark to insert it in its quotation. In any event, the parties to this contract have not sought to amend or rectify it, and must be treated as having intended what is contemplated by its language. We find that at the time they entered into their contract, Hallmark and Brantwood had a shared intention and agreement that Brantwood would have the right to “call the shots” (to borrow a phrase used by Med+Experts’ counsel in argument) with respect to important aspects of Hallmark’s labour relations with the workers it sent to Brantwood. In these circumstances, we find that the prerequisites to the existence of a discretion under subsection 1(4) have been met. Our comments in paragraphs 114 and 115 about the Brantwood/Med+Experts relationship are sufficiently applicable to the Brantwood/Hallmark relationship that we should exercise that discretion by declaring that Brantwood and Hallmark constitute one employer for the purposes of the *Labour Relations Act* with respect to persons engaged by Hallmark to work in Brantwood’s nursing home.

119. These declarations under subsection 1(4) in each case are effective from the date the affected contractor first engaged persons to perform work at Brantwood’s nursing home in Burlington, Ontario. Accordingly, in each case Brantwood and the contractor were bound by the terms of Brantwood’s agreement with CUPE when persons engaged by the contractor were employed in classifications covered by that agreement. The parties dealt in argument with whether, if Brantwood were found to be their employer, the employment of these replacements would constitute a violation of the collective agreement which could be treated as an unfair labour practice on the argument that section 50 of the Act requires the parties to a collective agreement to comply with its provisions. We are satisfied that it was a breach of the collective agreement by Brantwood *and* the contractors that they did not abide by the provisions of the collective agreement in employing persons to work at Brantwood in classifications covered by the collective agreement. It is unnecessary for us to determine whether section 50 converts these breaches into breaches of the Act.

120. When the Board exercises its discretion to treat two or more entities as one employer for the purposes of the *Labour Relations Act*, it is empowered to “grant such relief, by way of declaration or otherwise, as it may deem appropriate.” Apart from a declaration that certain entities constitute one employer, such relief is usually limited to a declaration identifying the bargaining rights and collective agreements which therefore bind each of the entities which make up that notional single employer. The Board usually leaves the detailed consequences of these declarations to be worked out by the parties at the bargaining table or in collective agreement arbitration. In all the circumstances of this case, and having particular regard to the length of time which has passed since the aforesaid breaches, we propose to go farther. We deem it appropriate to deal with the general question of the collective agreement liability consequences of our determinations under subsection 1(4). Accordingly, we declare that Brantwood and Hallmark breached the collective agreement from and after October 23, 1983, by assigning laundry and housekeeping work to employees other than those entitled to such work by the terms of that agreement, and by failing to abide by the union security and recognition provisions of the agreement with respect to the employment of those who were

assigned that work. We direct Brantwood and Hallmark to forthwith reinstate “laid off” workers in accordance with their entitlement under the collective agreement, and declare that they are liable to compensate such workers, and CUPE, for any losses they have suffered as a result of these breaches. We declare that Brantwood and Med+Experts breached the collective agreement from and after January 22, 1984, by assigning health care aide/nurses aide work to employees other than those entitled to it by the terms of that agreement and by failing to abide by the union security and recognition provisions of the agreement with respect to the employment of those who were assigned that work. We direct Brantwood and Med+Experts to reinstate “laid off” workers in accordance with their entitlement under the collective agreement and declare that they are liable to compensate such workers, and CUPE, for any losses they have suffered as a result of these breaches. In accordance with the usual practice, the parties did not deal in evidence or argument with the quantum of compensation which might be payable if liability were found, nor did they deal with the consequences, if any, a section 1(4) declaration might have on whatever collective agreement provisions may have resulted from the interest arbitration into which they were headed. These are matters which we presume can be dealt with in rights arbitration under the appropriate collective agreement if the parties are unable to resolve them now themselves. We will defer to that process on those issues rather than deal with them in further hearings ourselves. We would reconsider that aspect of our decision if the arbitration process proves to be ineffective as a means of resolving those issues on their merits.

121. In view of our disposition of CUPE’s application under subsection 1(4), it is unnecessary for us to determine whether, but for that disposition, Brantwood would be the employer at law of persons engaged by either Med+Experts or Hallmark to work at Brantwood. It is also unnecessary to determine whether, in making its arrangements with Med+Experts and Hallmark, Brantwood committed an unfair labour practice. Even if it did, the relief we would grant in these circumstances is reinstatement of displaced workers and damages for their losses and those of the applicant/complainant. We have awarded reinstatement in the exercise of our remedial authority under subsection 1(4), and will deal with damages if that cannot be resolved at arbitration.

122. There is one respect in which the section 89 complaint was broader than the section 63 and subsection 1(4) applications: the former can be read as seeking a remedy for the consequences of Brantwood’s arrangements with Medox, while the latter cannot. When the section 63 and subsection 1(4) applications were filed, counsel for CUPE wrote to the Board asking that Medox ... “be withdrawn [sic] as an interested party in the section 89 complaint...” and that the numbered company now known as Med+Experts be added, and the Board issued an order in Board File 2058-83-U granting leave to withdraw as against Medox and directing that Med+Experts be added as a respondent. CUPE did not seek a declaration that Medox and Brantwood constituted one employer during the period Medox supplied workers to Brantwood. Brantwood filed a copy of the Medox contract. Its counsel asked Mrs. Hallatt a series of questions about it; the thrust of her replies was that Brantwood had nothing to do with hiring, firing, supervision or other matters involving health care aides/nurse aides supplied by Medox during the period of just over five weeks between December 15, 1983 and January 21, 1984. Mrs. Hallatt was not cross-examined on her testimony about the Medox contract. It was not argued that Brantwood’s relationship with Medox resulted in Brantwood’s being the employer at law of persons engaged by Medox to work at Brantwood during that period. Counsel’s argument was that the Act was violated either by Brantwood’s decision or decisions to contract out or by the manner of implementing the decision or



decisions. Argument with respect to implementation focused on the arrangements with Hallmark and Med+Experts. The argument with respect to the decision or decisions themselves was that they were motivated by “anti-union animus” which was revealed by or could be inferred from the incidents described in paragraphs 30 to 39, together with Mr. Hallatt’s having accused CUPE representatives of trying to drive him into bankruptcy and out of business, and his having used intemperate language in various meetings with CUPE representatives.

123. Brantwood’s refusal to recognize or bargain with CUPE’s bargaining committee by reason of its composition was clearly a violation of the *Labour Relations Act*. In *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309, after quoting what is now section 64 of the Act, the Board observed that:

47. This section protects a union from employer interference with not only the formation, selection or administration of a trade union, but also the representation of employees by a trade union. The structure and composition of the union’s bargaining team cannot be determined by the employer. A refusal by an employer to negotiate until the composition of the union’s bargaining team is altered, therefore, amounts to a breach of the duty to bargain in good faith - the essence of the wrong being the failure to recognize the union, as represented by its properly constituted bargaining team.

Brantwood’s wrongdoing was compounded when Mr. and Mrs. Hallatt solicited the support of Mrs. Fernie in opposing conciliation by reason of the composition of the union’s bargaining committee and encouraged her opposition to her bargaining agent’s position on the inclusion of laid off workers on the bargaining committee. Their wrongdoing was further compounded when they responded to the argument that laid off workers still have rights under the collective agreement by dismissing all laid off workers, on the pretext that this was somehow a requirement of the Ministry of Labour. While an indefinite layoff of more than 13 weeks is deemed to be a termination for the purpose of the *Employment Standards Act*, that Act does not confer on an employer any right to treat the indefinite layoff as a termination for any other purpose, and particularly not for the purpose of abridging rights under a collective agreement. (If any authority for this self-evident proposition is needed, it may be found in *Re Employment Standards Act and Exolon Company of Canada Ltd.*, February 8, 1978 (Springate, Referee (Ontario)) cited in *Freightliner of Canada Ltd., v. Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 et al.* (1982) 143 D.L.R. (3d) 179, 83 CLLC 14,019 (BCSC)). These are serious breaches of sections 15, 64 and 66 of the *Labour Relations Act* which require the exercise of the Board’s remedial authority under section 89 of the Act. In order to fashion an appropriate remedial response to these breaches, we consider it important to know what has transpired in the parties’ collective bargaining since our last hearings, and we will direct that these proceedings be relisted for further hearing for the purpose of hearing the parties’ evidence and argument with respect to this aspect of remedy.

124. Brantwood’s failure to deduct and remit union dues and to offer kitchen work to all laid off workers before hiring a new part-time employee are not by themselves matters which we would inquire into under section 89, nor do we consider that they assist in any material way in assessing the Hallatts’ motivation in causing Brantwood to contract out health care aide/nurses aid work to Medox. The relevant issue raised by the evidence of Mr. Marini and Ms. Woods is not whether Mr. Marini’s statements to Ms. Woods at their meeting in September, 1983 constituted an unfair labour practice, but whether those statements establish that Brantwood’s contracting out to Hallmark was motivated by vindictiveness in addition to



financial considerations. We are satisfied that whatever Mr. Marini said on that occasion did give Ms. Woods that impression. Mr. Marini may or may not have intended to give that impression at the time. It is often of advantage to a bargaining agent to portray his principal as likely to react in an other than totally logical way to an opponent's refusal to accommodate his position. Mr. Marini might have intended to convey the impression that Mr. Hallatt was vindictive toward CUPE in contracting with Hallmark, without saying so in so many words and without actually believing it to be true. In any event, we are not satisfied that he was instructed by the Hallatt's that this was true. Any statement he may have made to this effect was either a rhetorical device or a statement of personal opinion; whatever was said can in neither event be treated as an admission on behalf of Brantwood about its motivation in contracting with Hallmark, nor are we prepared to treat something said in these circumstances as especially reliable. For all these reasons, Ms. Woods' evidence about Mr. Marini's behaviour in September 1983 is of little assistance to us in determining whether Brantwood's decision to contract with Medox in December 1983 was motivated by "anti-union animus."

125. The Hallatt's irascible behaviour toward CUPE does not constitute direct evidence of "anti-union animus" of the sort which converts otherwise lawful behaviour into an unfair labour practice, nor do the other incidents referred to in evidence. Brantwood's decision to contract out work to Medox was clearly for the primary purpose of reducing costs by avoiding the wage rates in its collective agreement with CUPE. In *Kennedy Lodge Inc.*, *supra*, the Board observed that this establishes neither a complete defense nor a *prima facie* case for a finding that a subcontracting arrangement violates the *Labour Relations Act*. It observed that in the absence of direct evidence of anti-union animus, inferences as to its presence or absence as a motivating factor would ordinarily arise from an examination the nature of the subcontracting arrangement itself. Except as indicated earlier, there was no examination of the Medox contract in evidence or in argument. It was not argued that subsection 89(4) of the Act obliged Brantwood to offer more evidence than it did with respect to its five week relationship with Medox. In those circumstances, the section 89 complaint is dismissed insofar as it concerns Brantwood's decision to contract with Medox and resulting reassignment of work between December 15, 1983 and January 21, 1984, inclusive.

126. In summary, the Board:

- (a) declares that the respondents Brantwood Manor Nursing Homes Limited, and Hallmark Housekeeping Services Inc. from and after October 23, 1983 constitute one employer for the purpose of the *Labour Relations Act* with respect to persons engaged by Hallmark to perform work at Brantwood's nursing home in Burlington, Ontario;
- (b) declares that the respondents Brantwood Manor Nursing Homes Limited, and Hallmark Housekeeping Services Inc. from and after October 23, 1983 were both bound as employer by the terms of Brantwood's collective agreement with CUPE, finds that they breached that agreement from and after October 23, 1983, by assigning laundry and housekeeping work to employees other than those entitled to such work by the terms of that agreement, and by failing to abide by the union security and recognition provisions of the agreement with respect to the employment of those who were assigned that work, directs that Brantwood and Hallmark forthwith

reinstate "laid off" workers in accordance with their entitlement under the collective agreement and declares that they are liable to compensate such workers, and CUPE, for any losses they have suffered as a result of these breaches;

- (c) declares that the respondents Brantwood Nursing Homes Limited and Med+Experts Inc. from and after January 22, 1984 constitute one employer for the purposes of the *Labour Relations Act* with respect to persons engaged by Med+Experts to perform work at Brantwood's nursing home in Burlington, Ontario;
- (d) declares that the respondents Brantwood Nursing Homes Limited and Med+Experts Inc. from and after January 22, 1984, were both bound as employer by the terms of Brantwood's collective agreement with CUPE, finds that they breached that collective agreement from and after January 22, 1984, by assigning health care aide/nurses aide work to employees other than those entitled to it by the terms of that agreement and by failing to abide by the union security and recognition provisions of the agreement with respect to the employment of those who were assigned that work, directs that Brantwood and Med+Experts reinstate "laid off" workers in accordance with their entitlement under the collective agreement and declares that they are liable to compensate such workers, and CUPE, for any losses they have suffered as a result of these breaches;
- (e) declares that Brantwood's refusal to recognize or bargain with CUPE's bargaining committee by reason of its composition, and the other related activities referred to in paragraph 123 hereof constitute violations of sections 15, 64 and 66 of the *Labour Relations Act* which require the exercise of the Board's remedial authority under section 89 of the Act, and directs that these proceedings be relisted for further hearing for the purpose of hearing the parties' evidence and argument with respect to this aspect of remedy;
- (f) otherwise dismisses these applications and complaint.

#### **DECISION OF BOARD MEMBER J. P. WILSON;**

1. This case is one in which the Union has complained that a change in the methods by which Brantwood Manor conducts its business has resulted in a loss of employment to the employees in a bargaining unit represented by the Union. The central allegation by the Union is that Brantwood Manor has arranged for outside agencies, Hallmark and Med+Experts, to perform work in the Nursing Home that was previously performed by their bargaining unit employees. Brantwood Manor in its defence asserts that its actions were necessary to reduce its costs in order to remain in business and avoid bankruptcy. In assessing these opposite views, and in deciding whether the Employer's conduct entitles the Board to provide a remedy to the Union, the Board must consider these issues:

- i) Has the collective agreement been violated by Brantwood

Manor in contracting with Hallmark and Med+Experts to provide much of the services previously performed by its own bargaining unit employees?

ii) Do the relationships between Brantwood Manor and Hallmark and Med+ Experts give rise to declarations by the Board that under section 1(4) of the Act:

a) Brantwood Manor and Hallmark constitute one employer for the purpose of the Act;

b) Brantwood Manor and Med+Experts constitute one employer for the purpose of the Act; and

c) That all the above entities are bound by the terms of the Brantwood collective agreements with CUPE.

2. The collective agreement between Brantwood Manor and CUPE contemplates contracting of work done by members of the bargaining unit in Article 8.05 (b), which reads:

When an employee is subject to having his employment terminated as a result of the Employer sub-contracting work done by him the Employer will offer any available employment to him, provided he has the required qualifications. If no work is available which the employee is qualified to perform the employee shall be permitted to invoke the provisions of paragraph (a).

(Paragraph (a) is a “bumping” provision based on seniority and qualifications).

Article 4 of the agreement backs up this concept with a Management Functions clause which in 4.02 (a) includes, in part, the right to determine:

...the amount of supervision necessary, combining or splitting up departments, work schedules, establishment of standards of care and quality, the determination of the extent to which the Home will be operated and the increase or decrease in employment.

3. It is a recognized fact in the nursing home industry that sub-contracting or contracting out work in the nursing homes is an acceptable practice. In his dissent on the P. Picher arbitration on *Thomson House* (May 1984), Stewart D. Saxe noted:

The Adams interest award also evidences the “broader climate in the particular industry”. I find that the industry accepted that nurses aides’ work could be contracted out. Furthermore, today it is even clearer than it was in 1966 that collective bargaining relationships generally accept the possibility of contracting out of work. So to do the legal and social concepts of our world at large.

4. In considering the matter of sub-contracting, the construction industry no doubt presents the best model. At the turn of the century, general contractors were just that; they performed all the work with direct-hire employees. In some cases a particular piece of special or heavy equipment would be supplied and installed by the manufacturer using his own forces. As installations became more complex, certain parts of the work were sub-contracted to specialty contractors who could perform it more efficiently, with better workmanship, in accordance with any governmental and municipal codes and (very importantly) usually at a



lower cost. The general contractor still had the responsibility to complete the work as specified by the owner in the prime contract and had to rely on his sub-contractors to perform the work on time, in accordance with the applicable codes and to suit the owner. In larger contracts the work would be designed by an architect, following the standards of the applicable building codes, aided by consulting engineers on such disciplines as civil, structural, mechanical and electrical engineering who in turn were bound by the requirements of a multitude of Municipal, Provincial and Federal Acts & Codes. To that end, inspectors from the architect, the consulting engineers, Municipal and Provincial Departments and Ministries monitored the work, issued deficiency notices if the work was not properly performed or if improper materials were used, and on occasion, where safety was a factor, they could shut the project down. The general contractor had recourse under his contract with the sub-contractor to cancel the sub-contract and/or sue the sub-contractor for non-performance.

5. Primarily, the general contractor is responsible for building the entire building and the sub-contractors for performing their particular trades, which may encompass all the work on the site with the general contractor providing only a supervisor and a labourer to clean up debris. It is important to note that, in the majority of cases, each contractor, general or sub, provides his own financing, tools, pays his own employees wages and benefits and makes all legally required deductions from their wages, plans and executes his own work, obeys the applicable codes and stands to make a profit or risk a loss. Exceptions to this general statement are those whose work is performed on a fee or cost plus basis or where a sub-contractor is a wholly owned subsidiary of a general contractor.

The same philosophy extends into the maintenance of industrial, commercial and institutional buildings. Here, for example, the building manager may contract out some or all of their maintenance work to maintenance contractors, who have multi-trade resources, or to selected specialty contractors as the need arises. Some maintain a skeleton crew for emergencies; some do not, but rely on a 24 hour service from the contractor. There are many approaches used ranging from yearly contracts to the supply of labour only, on demand. Remuneration can take the form of payment by fee, cost plus or charge out rates - the latter being an hourly charge for the services of the workers supplied which also includes the workers wages, benefits and the contractors overhead and profit. The sub-contractors in the above areas of work are (with the noted exception) entirely reliant on their own management expertise, the efficiency and skill of their employees, their working relationships with owners, general contractors, inspectors and so on, to operate a respected and profitable business. Those are the main qualities that enable a contractor to seek profitable work in direct competition with an owners own employees. Other factors which enter in on the cases of hourly charge-out rates are:

- i) The owner pays for only the number of hours a tradesman is on the job and full days are not a requirement.
- ii) All benefits deductions for Tax, O.H.I.P., UIC etc... are included in the charge-out rate as is the contractors overhead and profit.
- iii) While the contractors charge-out rate may exceed the wage rate of the in-house worker the ultimate unit cost of the work performed may be substantially lower because of the skill and efficiency of the contractor's forces and the offsetting costs in in-house agreements of such not too obvious expenses as sick days off, excessive vacation days and

statutory holidays and so on, which can increase a scheduled wage rate by a substantial percentage.

Sick leave was a key issue in the *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931. Regardless of the methods employed in the use of contractors in the construction, maintenance or even the operation of a system (e.g. Metro Toronto Traffic Signals System & numerous Waste Disposal Systems in the Province) the fact is evident that in the latter instances there is a definite displacement of in-house personnel who could or did perform the work.

6. Here, we have Brantwood Manor operating a nursing home and Med+Experts and Hallmark performing their specialties.

I suggest that Med+Experts and Hallmark are separate corporate bodies performing bona fide sub-contracted work for Brantwood Manor much in the manner of a “trade sub-contractor”. Indeed certain of the work such as laundry, kitchen, housekeeping and maintenance etc... can be classed, at the least, as semi-skilled.

In the Health Care Aide and Nurse Aide requirements we are again looking at personnel who have been trained in certain skills, and the Registered Nursing Assistants are professionally trained. All of this indicates that the quasi-professional HCA's and NA's need little, if any, direction on a daily basis. They know what to do and when to do it. Their work is laid out for them through a care plan that is devised for every resident. These care plans are produced by the Registered Nursing Staff, as directed by a physician, and reassessed and monitored on a regular basis.

7. Behind Brantwood Manor, Med+Experts, Hallmark and the Administrator & Director of Nurses we find the *Nursing Homes Act*. This Act, in fulsome detail, directs how a Nursing Home shall operate. Of its some 100 separate regulatory articles, all directed at the care and well-being of the residents we find a general breakdown:

3 are directly on physicians

6 are directly Nursing Care

4 are directly on Nutritional Care - under control of the Administrator

1 on housekeeping - directed by the Administrator

1 on laundry - directed by the Administrator

85 are on the construction of the building, safety and fire protection, environmental comfort, admission, recording, discharge of residents, maintenance of the Home and care and comfort of the patients through the housekeeping, kitchen and laundry services.

8. I have no difficulty in concluding that all kitchen, housekeeping, laundry and maintenance work in the nursing home can clearly be sub-contracted in the whole or in part. This Board came to a similar conclusion on the contracting out of housekeeping services in *Kennedy Lodge Nursing Home*, [1980] OLRB Rep. Oct. 1454. I see no problem in a Nursing

Home Administrator sub-contracting parcels of work to outside contractors and requiring them to perform to the NHA specifications and to meet the approval of the NHA inspector on his visits.

The majority decision in para. 117, emphasizes that the Hallmark contract includes "... at any time your administration can make suggestions *and changes* in such matters as discipline, staff handling, hiring and firing". Disregarding the ambiguity of the sentence, I find it difficult to read in "substantial control", as mentioned in the next sentence. Of equal, if not greater significance, is the extract from the Hallmark contract quoted in para. 40, page 23:

The customer agrees that it will not entice into its own employment any foremen, foreladies or other supervisory personnel employed by the contractor on the customer's premises, either during the term of the agreement or within twelve months after its termination.

In other words, "keep your hands off my people" a not uncommon reaction from a sub-contractor and scarcely indicative of a cosy arrangement between the parties. In summary, I would not treat Brantwood Manor and Hallmark as constituting one employer for the purposes of the Act.

9. In the case of Med+Experts we should first look at the Nursing Home Act the thrust of which is to cover. "...any premises maintained and operated for persons requiring nursing care...". As pointed out above there are 100 regulatory articles all directed at the care and well-being of the residents. These articles must be observed completely by the owner/administrator of a nursing home or their license is placed at risk. Some of these articles are directed at nursing care, nutrition, housekeeping, maintenance and laundry, and are still a matter of concern for the owner/operator. However, in nursing care, we are looking at a matter of 6 articles which cover that area. In looking at them, several things are apparent:

i) Other than monitoring to ensure compliance with the NHA, they are severable from the administrator's duties on a day-to-day basis.

ii) The NHA is detailed in the requirements of nursing care, ranging from the ratio of nursing staff to residents, to the number of times a patient should be turned and the hours of nursing care to be allotted to each patient.

iii) Emphasis is placed on giving care "under the supervision of a registered nurse or a registered nursing assistant as directed by a physician".

iv) Once the care plans are established, the system runs itself except for monitoring.

Much emphasis has been placed on the role of the Brantwood Manor Director of Nursing in relation to Med+Experts. In my view, Med+Experts have taken over the direct involvement of the DON in patient care and left her with the other duties to her own direct staff, to admit and discharge patients and so on.

Ms. Judith Bishop and Ms. Elvie Hall in their evidence both made it abundantly clear that Med+Experts had taken over the nursing care functions in Brantwood Manor. Further, that



Med+Experts performed all the functions of an independent employer in hiring, firing, training, scheduling, transferring their employees and carrying them in a proper payroll with the required deductions. While the contract between Brantwood Manor and Med+Experts contains inconsistencies, I prefer to accept the *viva-voce* evidence given by Ms. Elvie Hall.

Rigid control of patient care as specified in the *Nursing Homes Act* is no more onerous than the many laws, regulations and codes which protect the public and workers in the subcontracting of other types of work.

Further, the *Nursing Homes Act* does not specifically preclude the contracting out of work. It only demands that the licensee shall ensure that the proper facilities and services shall be provided in accordance with the requirements of the *Nursing Homes Act*. Absent any ban on contracting out such a practice would seem to be a viable alternative to any owner/operator.

In my view, Med+Experts have met the criteria as the employer as listed in the *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, as quoted in the majority decision at paragraph 83. In summary, I would not treat Brantwood Manor and Med+Experts as one employer for the purposes of the Act.

10. In the overall, I do not feel that Brantwood Manor committed an unfair labour practice in contracting out work to Med+Experts and Hallmark. Also, I do not feel that the contracting out was based on anti-union animus but on economic necessity. Any unpleasant feelings that arose between Brantwood Manor and the Union arose, in my view, after the contracting out, not before.

11. In regard to “substantial control” that is always in the hands of the one who pays the bill. The owner of a facility can always exercise his rights to cut off a contractor or sub-contractor for improper performance. That is particularly easy when the work is being performed on a charge out basis as it is here. Over the years, owners have not been precluded, in most cases, from sub-contracting work and the practice will likely continue. The allegation of the retention of “substantial control” by Brantwood Manor in this case does not really meet the requirements of common control as envisaged by section 1(4) of the *Labour Relations Act*.

While there are many cases that come before the Board that merit the application of section 1(4), at times we are overly prone to make the connection through very fine threads.

12. In regard to Brantwood Manor’s failure to recognize the CUPE bargaining unit and associated problems with Mrs. Fernie, I agree with the majority that they constitute violations of the Act and should be remedied.

13. Referring to my dissent in *Kennedy Lodge Inc*, *supra*, I would like to reiterate some of my comments:

10. It would seem that answers are necessary if the nursing home industry is not to wind up in complete chaos. And as an aside, municipal control of such services as against the private nursing home does not seem to be a viable answer; they are in trouble too as witness the recent arbitration at Thompson House in Don Mills. The union members having achieved great gains over the last six years must be prepared to curb their ambitions or risk losing their places of employment. The nursing homes’ administrators need to curb expenditures and live

within their budgets. That may be difficult in view of their basic dedication to the welfare of the residents but it must be attempted. In future negotiations between union and management there must be a realistic attempt to arrive at workable agreements. The use of interest arbitration to achieve certain desired results is a poor substitute for collective agreements reached through negotiations.

11. The normal constraints on negotiations conducted under the *Labour Relations Act* are not as effective in this industry because the parties are subject to the *Hospital Labour Disputes Arbitration Act*. If the parties cannot come to an agreement, then resort is had to arbitration, not strike or lockout. Furthermore, these employers' revenues are strictly controlled by the Ministry of Health. They are faced with both revenues and wage costs that are beyond their control. In order to continue in business, a reduction in costs had to be effected. It seems to me that the decision was made by Kennedy Lodge in this case to subcontract for proper business reasons and not to deprive employees of their legal rights under our labour legislation. While it is indeed unfortunate that job losses to these employees will result, the remedy does not lie with the Board, but rather with the Ministry of Health to ensure adequate funding is maintained, and with the employees and their union to either seek protection from layoff under the collective agreement or agree to wage levels that will reflect the level of revenues received by the employer.

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**1904-85-R** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Applicant, v. **Conference Cup Co. Ltd.**, Respondent, v. Group of Employees, Objectors

**Certification - Petition - Employer supporting management employee's attempt to solicit objections to union - Advising employees of procedure for petitioning - Making available and collecting signed copies of petition for mailing - Petition not given weight - Certification procedure and treatment of petitions reviewed**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *F. C. Burnet* and *K. Rogers*.

**APPEARANCES:** *R. Jacques*, *Wendy L. Braunton*, *Nadine Oakley* and *David A. Brunson* for the applicant; *John L. Getliffe* and *G. Collette* for the respondent; *Bruce Macauley* and *Jim Fitzgerald* for the objectors.

**DECISION OF R. O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER K. ROGERS;** January 16, 1986

# I

1. This is an application for certification.
2. The correct name of the respondent is Conference Cup Co. Ltd., not Conference Cup. Co. *Limited* as specified in the application. The style of cause is therefore amended to reflect the proper name of the respondent employer.

3. There is no dispute, and the Board finds, that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that the unit of employees appropriate for collective bargaining consists of "all employees of the respondent in London, Ontario, save and except assistant plant managers, persons above the rank of assistant plant manager, office, clerical and sales staff".

5. Initially there was some dispute about the precise composition of the above-noted bargaining unit. The respondent employer took the position that six of the individuals named on the "employee list" accompanying its reply, were not "employees" within the meaning of the Act because they exercised managerial functions (see section 1(3)(b) of the Act). These persons were Bob Connell, "maintenance supervisor", Bruce Macauley, "production control supervisor", Larry Paterson, "production supervisor", and Rob Bakelaar, Dave Brundson, and Ron Taylor, all described as "shift supervisors". However, in discussions prior to the hearing, the parties agreed that Connell (maintenance supervisor), Macauley (production control supervisor), and Paterson (production supervisor) were properly considered part of the managerial team and excluded from the bargaining unit pursuant to section 1(3)(b) of the Act; while the shift supervisors, Bakelaar, Brundson and Taylor, were "lead hands" who exercised certain supervisory and co-ordinating functions but not to such a degree as to require their exclusion from the bargaining unit. Given the difficulty in defining a precise line between those who are entitled to statutory bargaining rights and those who are not, the Board is not disposed to go behind the parties' agreement. (However, see generally: J. Sack, Q.C. and M. Mitchell; *Ontario Labour Relations Board Law and Practice*, (1985) Butterworths at pp. 79-94.)

## II

6. Despite the difficulties which a layman may have in understanding the certification process, its outlines are really quite simple. The Board first determines the description of the appropriate bargaining unit and the number of employees in that unit. The Board then determines how many of those employees have become union "members" as defined in the Act (i.e., they have *applied* for membership and paid at least \$1.00 in respect of membership fees). These are the "yes votes" - to adopt, for the moment, the terminology used by some of the witnesses. Anyone who has not been approached or has not signed a card (etc.) is automatically treated as a "no vote" regardless of his/her actual views concerning the desirability of trade union representation. If the union enjoys the support of more than fifty-five per cent of the employees in the bargaining unit (a clear majority), the statute provides that it can be certified without recourse to a representation vote. If the union cannot obtain a threshold level of forty-five per cent support, its certification application will be dismissed. If the union's claim to majority support is questionable because it has obtained the support of more than forty-five per cent, but less than fifty-five per cent of the employees in the bargaining unit, the Board generally directs the taking of a representation vote. Thus, the typical certification application is largely a matter of arithmetic. Problems arise only when someone who has unequivocally indicated that he was a union supporter makes a timely written representation that he has changed his mind. That is the problem presented in this case.

7. In support of its application for certification, the trade union has filed documentary



evidence of membership on behalf of more than fifty-five per cent of the employees in the above-mentioned bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of \$1.00 has been made to the union in respect of its membership fees. The \$1.00 payment is in the nature of "consideration" and confirms the act of signing.

8. The documentary evidence of membership is supported by a properly completed Form 9, Statutory Declaration, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor do the parties allege any impropriety in the manner in which it was solicited. The employer and the objecting employees do not call into question the "voluntariness" of these individual acts of signing or suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and contents of the union's documentary evidence of membership are consistent with the requirements of section 1(1)(l) of the Act and, as well, meet the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" well in excess of that required by section 7(2) of the Act for certification without recourse to a representation vote.

9. However, there are also filed with the Board a number of documents signed by employees indicating that they wish to oppose the certification of the applicant union. These documents were filed prior to the terminal date. Four of the opposition documents bore the names of individuals who had previously signed membership cards and paid \$1.00 in respect of membership fees and, therefore, were "members" of the union within the meaning of section 1(1)(l) of the Act. These individuals had had a purported change of heart, and now allegedly no longer wished to support the applicant's certification. If this change of heart was a voluntary one so that the union's documentary evidence of membership did not reflect the employees' subsequent wishes, the Board, in accordance with its usual practice, would ordinarily exercise its discretion to direct a representation vote to resolve the question of the applicant's right to certification. In essence, this is the course of action urged upon us by the representative of the objecting employees. They argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses), are still insufficient to indicate the employees' "real intentions" - even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations. They urge the Board to disregard what the employees may have wanted then and to consider what (i.e. as at the terminal date) they later indicated. They urge the Board to canvass the employees' wishes by means of a representation vote.

### III

10. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights.

The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as the employees' bargaining agent, and to protect employees from possible employer reprisals the anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l)). There is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases - as, for example, where the one dollar payment is loaned to a potential union supporter, or where the card is not properly witnessed, or where the card is valid on its face but has been obtained through misrepresentation or intimidation, or where there is a problem respecting one or a few membership documents but not the others, etc. Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

11. On the other hand, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. In some jurisdictions the statute precludes or inhibits such expressions (British Columbia, Canada) so that certification is based solely on membership cards. In others they are irrelevant because the preferred method of testing employee wishes is a representation vote. Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

12. The Board recognizes that "statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and, in any event, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(l)) continue to support its certification.

13. The Board must be satisfied, however, that when these union supporters sign the document indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign

would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a statement of opposition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the opposition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a document opposing the union.

14. Frequently, as in the present case, such documents are openly circulated on or near the employer's premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign the document because he fears that a refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. But, in the Board's experience there are enough instances where employers have committed unfair labour practices, or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable.

15. It is for this reason that the Board undertakes the inquiry contemplated by Rule 73(5) of the Rules of Practice, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the opposition document that it truly represents the voluntary wishes of those who signed it. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, the Board discussed the nature of this inquiry in a long passage to which we might usefully refer:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in



deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

Reference might also usefully be made to the following passage from *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387, wherein the Board has recently reaffirmed its approach to such employee statements.

Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC 16,264, made the following observations:

• • •

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

#### IV

16. In the instant case the employee statements opposing the union's certification application take the form of individual typewritten documents, each bearing the signature of a single employee. Most of the documents bear the names of employees for whom no union membership card was submitted - presumably because they were not approached or, if

approached, indicated no interest in trade union representation. These statements of opposition add little to the inquiry mandated by section 7 of the Act. In the absence of proper documentary evidence of membership, there would be no basis for inferring support for the union, and the union is required to positively demonstrate such support. The absence of a membership card is already treated as a "no-vote" - again, to borrow the terminology used by one of the witnesses. Of more immediate concern is the purported change of heart by a few employees who had earlier become members of the union and indicated a desire for representation. What prompted them, a few days later, to sign a document purportedly indicating a contrary intent?

17. Evidence concerning the origination, preparation and circulation of the opposition documents was given by Bruce Macauley, the "production control supervisor". Mr. Macauley was one of three individuals whom the union and the employer agreed should be excluded from the bargaining unit because they exercised managerial functions within the meaning of section 1(3)(b) of the Act. However, the bargaining unit is relatively small (32 employees) and the "managerial team" is somewhat informal and unstructured, and while the parties have identified Mr. Macauley as being on the first tier of management, it is clear that he also acts as a conduit of information which he receives from the "shift supervisors" who work with and co-ordinate smaller work groups but are themselves included in the unit. On the other hand, there is also some indication in Mr. Macauley's evidence of responsibilities more clearly managerial in character. He testified that he spends about sixty per cent of his time in supervisory duties and does not normally work on the machines except on a "fill-in" capacity when there are backlogs. He may occasionally grant casual time off and, if necessary, require employees to work overtime or schedule them to come in early. He shares an office with two other individuals whom the parties have also agreed to exclude as members of management. He monitors the quality of employees' work and will discuss problems or error with them. He has had occasion to recommend to the plant manager that an employee be suspended or dismissed, and although his recommendations have not always been followed, it is clear that his influence is not insignificant.

18. Mr. Macauley testified that he first learned of the union's organizing efforts on Friday, November 1, 1985, when the plant manager brought to his attention the Form 6, Notice of Certification Application. After reading the notice, he came to the conclusion that he could be included in the proposed bargaining unit and consulted a solicitor friend as to what might be done to avoid that consequence. Acting on the solicitor's advice and the advice of another friend with whom he has business dealings, Mr. Macauley drafted the opposition statement which was typed by his wife. Mr. Macauley made a number of xerox copies for distribution to interested employees. When his supply was exhausted, he later made more copies on the company's office copier to which he has access.

19. While Mr. Macauley's actions spring from his own personal opposition to the union, his activities were not unknown to senior members of management. On the contrary, when Mr. Macauley advised senior company officials of his intention, they gave him permission to post copies of his statement at various locations throughout the plant, together with a notice which they prepared for him. The notice reads as follows:

TO WHOM IT MAY CONCERN

CONFERENCE CUP CO. LTD. HAS RECEIVED AN APPLICATION BY A UNION FOR  
CERTIFICATION.

POSTED ON THE NOTICE BOARD AS REQUIRED BY LAW IS THE PARTICULAR NOTICE UNDER THE LABOUR RELATIONS ACT.

THE COMPANY HAS NO PERSONAL OPINION ON THE APPLICATION EXCEPT THAT THERE MAY BE SOME QUESTION CONCERNING THE PROPOSED MAKEUP OF THE BARGAINING UNIT, IN THAT SOME EMPLOYEES ARE CONSIDERED MANAGEMENT BY THE COMPANY.

IF YOU AS AN EMPLOYEE HAVE OBJECTION TO BECOMING PART OF A UNION, YOU HAVE A RIGHT TO OBJECT UNDER THE TERMS SET OUT IN PARAGRAPHS 4 and 5 and 6 and 7 OF THE NOTICE FORM. IF YOU DO HAVE OBJECTIONS, YOU MUST FOLLOW THE FORM AND HAVE YOUR OBJECTION TO THE ONTARIO LABOUR RELATIONS BOARD BY REGISTERED MAIL NO LATER THAN *NOVEMBER 7th, 1985*. IF YOU DO NOT OBJECT IN THIS WAY, BY NOVEMBER 7, 1985, IT WILL BE TOO LATE FOR YOU TO REGISTER YOUR OBJECTION AND THE MATTER WILL PROCEED WITHOUT YOUR INPUT.

*ATTACHED TO THE NOTICE BOARD AT VARIOUS PLACES WILL BE A FORM WHICH YOU MAY SIGN IF YOU SO WISH, AND WHICH CAN BE SIGNED AND LEFT WITH THE OFFICE, WHERE ENVELOPES WILL BE PROVIDED FOR MAILING.*

[emphasis added]

20. In addition, the employees on each of the three shifts were asked to attend a meeting in the company lunchroom during what would ordinarily be their regular working hours. Mr. Macauley attended two of those meetings (day and evening shift) together with the company owner. He testified that he did not attend the third meeting, but assumed that the content was the same.

21. At the meetings, the company owner indicated that there had been an application for certification and that employees were entitled to object. It was further indicated that Mr. Macauley had prepared statements of objection which employees could sign if they wished to do so. According to Mr. Macauley, the owner indicated that those objections could be given to him (Macauley) or delivered to the company office for mailing to the Board. As it turned out, most of the employees adopted the first option. Thus, whatever the company's intention, it was obvious that the employees were being invited, on an individual basis, to signify to their employer, in writing, whether or not they opposed the union's certification.

22. There is no allegation that the employer has engaged in any overtly coercive conduct nor were there even any disparaging remarks directed against the union. However, the employer's decision to announce and support the solicitation of employee statements opposing the union makes it very difficult to conclude that such statements were forthcoming voluntarily from those employees who, shortly before, had clearly and unequivocally subscribed to union membership. Those employees would know that Mr. Macauley, a managerial employee, had prepared the statements in opposition, and that he would be making copies available for signing. Apart altogether from Mr. Macauley's own managerial status, they would know (or reasonably infer) that the owner supported Mr. Macauley's endeavours - as, of course, it did. It was the company's decision to interrupt production for the purpose of holding meetings to point out that Mr. Macauley would be taking steps to contact opponents (which, in turn, by a process of elimination, could identify union supporters).

23. Also troubling is the suggested mechanism for expressing opposition: a written



statement to be delivered to Mr. Macauley himself or (in accordance with the posting prepared by the company) to the company's office. There is no precaution taken to ensure that the employees' anonymity will be preserved. In consequence, the employees were faced with a choice: either sign the individual statements in opposition and deliver them to the company or Mr. Macauley, or decline to do so, and risk the reasonable inference (which, in fact, is substantially correct) that those who did not tender such statements would be known to the employer as union supporters.

24. This is not to say that the employer has intentionally engaged in a calculated scheme to "ferret out" the union supporters or that the employer has any intention of penalizing employees who opt to join a trade union. There is no evidence that this is the case. But that is not the point. The issue is not the employer's intentions but rather the fears of the ordinary employee whose union support may be exposed to the employer.

25. The concern expressed in the cases is not an artificial construct based only on speculation, nor is it a paternalistic preconception about the way in which employees engaged in forming a union will view their employer. The decision of employees to opt for trade union representation is not a neutral event from the employer's point of view. Collective bargaining can lead to a challenge to managerial prerogatives which were previously unfettered. Employer opposition is entirely understandable, and, of course, not in itself illegal. But, by the same token, the typical employer is not likely to warmly embrace those employees who have opted to "bring the union in". Section 111 of the Act explicitly recognizes that employees may have legitimate fears if they are identified as trade union supporters - not that their employer will engage in reprisals, but that such occurrence is possible, has happened in some instances, and is infinitely easier when an employer is able to precisely identify who supports the union and who does not. (For an example of a situation in which an employer unlawfully discharged known union supporters even after an unsuccessful representation vote see: *Wyeth Limited*, [1979] OLRB Rep. Dec. 1311.) That a particular employer may, in fact, have no such intention does not diminish the potential for employee concern recognized by section 111 of the Act; and we might note that the instant case might have had a quite different complexion if the employer had not coupled its expressed disinterest with a positive suggestion about the way in which employees could openly identify themselves to management as persons who did not support the union. Finally, for the purpose of completeness, we should also point out that there was no direct evidence concerning the circumstances in which three of the four union "members" who had purportedly "changed their minds", came to execute the opposition document. We have no direct evidence as to the reason for their "change of heart" other than as a response to the scenario outlined above.

26. We do not think that it is necessary or appropriate for the Board to express any view on the age-old debate about whether union certification "should" be based on representation cards, representation votes, or some combination of the two - save to note that certification is merely the first step in an often long and laborious collective bargaining process, and if a union does not have employee support during this process the relationship will not last long. To date, partisans for one point of view or the other have not been able to mobilize conclusive empirical evidence or persuade the Legislature that one mechanism or the other is demonstrably better able to meet the diverse objectives of the labour relations community. [For an interesting discussion of this debate, see Paul Weiler: *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell Co. Ltd., Toronto (1980) at pages 37-49.] The issue before us is much narrower than that: as a purely factual matter, should we give weight

to the statements of objection of four union members and should we exercise our discretion to direct a representation vote, notwithstanding the fact that the union has filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit? For both questions, our answer is “no”. We are satisfied that the union has demonstrated the required level of documentary membership support to warrant certification without recourse to a representation vote and we do not think there is a sufficient basis to exercise the Board’s residual jurisdiction to direct such vote.

27. For the foregoing reasons, the Board finds and confirms that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 7, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. A certificate will issue to the applicant in respect of the above-described bargaining unit.

#### **DECISION OF BOARD MEMBER F.C. BURNET;**

1. In paragraph 26, the majority sums up the issue and its decision as follows:

...should we give weight to the statements of objection of four union members and should we exercise our discretion to direct a representation vote, notwithstanding the fact that the union has filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit? For both questions, our answer is “no”. We are satisfied that the union has demonstrated the required level of documentary membership support to warrant certification without recourse to a representation vote and we do not think there is a sufficient basis to exercise the Board’s residual jurisdiction to direct such vote.

I disagree.

2. The problem is that the documentary evidence itself is in dispute. Of a bargaining unit of 32, the union submitted 17 unchallenged cards (53%), plus 4 “overlaps”, that is, cards which were subsequently rescinded by the employee concerned by way of petition to the Board. If these four are excluded from union membership rolls, a vote becomes mandatory under the Act; if included, certification will follow without a vote.

3. Two familiar problems stand in the way of resolution of this problem of determining the real motivation of these four employees. First is the need to protect the anonymity of union supporters and non-supporters during these proceedings from possible intimidatory reprisals by either company or union. Second is the lack of knowledge of legal and Board proceedings, as well as financial constraints, on the part of employees who seek to exercise their right to petition the Board.

4. In the instant case, in view of these constraints and the resultant limitations in the scope and depth of evidence presented, I think it is not possible for the Board to conclude with a reasonable degree of certainty and objectivity whether the four persons are union supporters or not. The only solid evidence was that they signed both the membership card

and the counter petition. There wasn't any evidence that the four in question were or were not coerced or intimidated in either case. Of the five objectors who did testify (not necessarily including any of the "overlaps"), the uncontradicted and consistent evidence was that they were not coerced or intimidated into signing the petition. To the extent that inferences are to underlie our decision, then I would think that such evidence as we do have supports the opposite inferential conclusion than that reached by the majority.

5. But we do not need to rely on inferential conclusions to achieve the purposes of the Act here at issue, which is to respect the wishes of the majority of employees in selection of their bargaining agent. The certification procedures are based on the simple principle that no vote should normally be ordered where evidence of majority union support is clear and beyond question, i.e. fifty-five per cent or more. A vote should be ordered when attainment of fifty-five per cent is not clear and beyond question. This is the reality and imperative of the legislation as it currently stands, and it is immaterial whether philosophically one is inclined to favour the secret ballot over membership cards or the opposite.

6. The documentary evidence of over fifty-five per cent support referred to by my colleagues, in its totality, is not clear and beyond question. Given the inability of the Board or of the applicant or objectors to resolve the doubt respecting the true motivation of the persons in question, an expeditious vote by secret ballot is not only clearly the logical and equitable course for all parties, but is, in my view, required by the letter and spirit of the legislation and the best method under these particular circumstances to achieve the fundamental purpose of the Act to promote harmonious and amicable labour relations.

7. I would so direct.

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**2060-85-R** United Food and Commercial Workers International Union, Applicant, v. Dollo Bros. Food Market Limited, Respondent, v. Group of Employees, Objectors

**Bargaining Unit - Whether meat department employees sharing community of interest with other grocery store employees - Whether entitled to separate unit - Fact that meat department employees entitled to craft status in appropriate cases not necessarily establishing separate community of interest**

**BEFORE:** R. A. Furness, Vice-Chairman, and Board Members P. J. O'Keeffe and J. Wilson.

**APPEARANCES:** Harold F. Caley and Bruce Zufelt for the applicant; Kinnear Carrick, David Dollo and Diane Dollo for the respondent; no one for the objectors.

**DECISION OF THE BOARD;** January 20, 1986

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

2. The applicant is seeking certification with respect to a bargaining unit defined in



terms of “all employees of the respondent in the Township of Anson, Hindon and Minden, save and except store manager, persons above the rank of store manager, produce manager, bookkeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. The respondent, however, has adopted the position that due to a difference in community of interest the meat department employees ought to be a separate bargaining unit. In other words, with respect to the same number of employees, the applicant contends that one bargaining unit is appropriate for collective bargaining while the respondent maintains that two bargaining units are appropriate for collective bargaining.

3. The respondent operates a grocery store in the Town of Minden and employs about fourteen employees who would fall within the bargaining unit proposed by the applicant. In addition, David Dollo, the owner/store manager; Peter Dollo, the owner/produce manager; and Diane Dollo, the bookkeeper, work in the store. David Dollo is the son of Peter Dollo and the husband of Diane Dollo. The store extends on one level some 5,800 square feet and the normal complement of the meat department of the store is between two and three employees. From time to time other employees who do not regularly work in the meat department may work in the meat department.

4. Meat cutting requires certain skills in order to recognize the various parts of an animal and to be able to cut the meat for sale in a profitable manner. It takes up to a year to train a meat cutter. A meat cutter uses a variety of knives and a saw which are not used by other employees in the store and wears certain protective clothing such as an apron and meshed gloves which are not worn by other employees in the store. In addition, a meat cutter is required to be knowledgeable about governmental regulations respecting safety, meat, cleaning and health standards. By way of comparison, it takes up to three months to train a grocery clerk and up to one month to train a cashier. A meat cutter has to be familiar with the shelf life of meat and know the seasonal and other variations and fluctuations in the demand and marketing of meat. The meat storage and cutting area and the meat counter are located in one corner of the store. It takes up to a year to train a meat wrapper in order to learn the necessary skills. These skills include recognizing the cuts of meat, ability to correctly label the meat, placing on the counter, knowledge of price codes, placing prices on merchandise and awareness of expiry dates on products. The meat wrapper also adjusts the wrapping machine from time to time.

5. The persons who were employed in the meat department on November 14, 1985, the date of the filing of this application, were as follows:

Joe Dollo  
Brian Hogg  
Connie Sawyers.

On the Schedule “A” filed by the respondent Joe Dollo, a cousin of David Dollo, was described as a meat cutter, however, he is classified by the respondent as a meat wrapper. Connie Sawyers, who is described on Schedule “A” as a clerk is classified by the respondent as a meat wrapper. Brian Hogg is both described and classified as a meat manager. Other clerks place grocery and produce on shelves and counters in the same way that Ms. Sawyers places meat on shelves and counters. Grocery clerks rotate milk and dairy produce in the same way that Ms. Sawyers rotates the meat. Milk and dairy produce has to be placed in a cooler

in the same way that meat has to be kept in a freezer. Joe Dollo has also worked in the produce area for ten months to a year. He worked in the meat department between six and eight months. The meat cutting is basically done by the meat manager. During the summer months Elaine Yeo, a cashier, moves to the meat department and works as a meat wrapper. While Ms. Yeo was initially trained as a meat wrapper, she has worked as a cashier in the front end section of the store. Occasionally the clerks will place chickens in bags. When the meat wrapper is away David Dollo or Brian Hogg would wrap the meat. When necessary David Dollo works in the meat department as a meat cutter. All of the respondent's employees, including department heads, are paid an hourly rate. These hourly rates were set by David and Peter Dollo and the clerks are paid according to their skills and seniority. David and Peter Dollo are in charge of the labour relations for the store. All of the employees have the same working conditions and the meat manager and the grocery manager report to David Dollo. The meat department does not have a separate budget.

6. Meat department employees may form an appropriate bargaining unit when the conditions set forth in section 6(3) of the Act are satisfied. From time to time a local trade union of a trade union which was a predecessor of the applicant has applied for and been granted appropriate bargaining units of meat department employees. On the other hand, another local trade union which was also a predecessor of the applicant has been granted appropriate units of all employees in a retail store or stores, including meat department employees. For a general discussion of this history see *Ontario Food Division (Food City) of the Oshawa Group Limited*, [1978] OLRB Rep. Sept. 826 and *Huntsville IGA*, [1982] OLRB Rep. Nov. 1637. The provisions of section 6(3) provide that under the conditions set forth therein craft bargaining units are deemed to be appropriate for collective bargaining. The provisions of section 6(3) cut across the boundaries of community of interest with other groups of employees where the conditions set forth in section 6(3) are shown to exist. However, the converse that craft units are always appropriate bargaining units for collective bargaining is not true. The applicant clearly has an option on how to frame its application. The applicant has chosen to seek certification in terms of one bargaining unit.

7. Are there two appropriate bargaining units based upon distinct and different communities of interest of the meat department employees and the other employees of the respondent? In the view of the Board, the meat department employees and the other employees of the respondent do not possess distinct and different communities of interest. On the evidence before the Board, the employees work under the same conditions of employment. While the meat department employees do exercise different skills, the degree of interchange, bearing in mind the small size of the meat department, and the degree of common supervision with other employees does not cause the Board to determine that there is a distinct and different community of interest. Accordingly, the bargaining unit proposed by the applicant is appropriate. The Board determines on the evidence before it that Brian Hogg, the meat manager, does not exercise managerial functions within the meaning of section 1(3)(b) of the Act and is therefore included in the bargaining unit.

8. Having regard to the foregoing, the Board further finds that all employees of the respondent in the Township of Anson, Hindon and Minden, save and except store manager, persons above the rank of store manager, produce manager, bookkeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The objectors did not attend at the hearing and the Board dismisses the statement of desire. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 26, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. A certificate will issue to the applicant.

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**0750-85-R** United Food and Commercial Workers International Union, Local 175, Applicant, v. **Corporation of the Town of Dunnville**, Respondent, v. The Canadian Union of Public Employees, Intervener

Certification - Membership Evidence - Union's fee structure actually meeting Board's requirements re two-tier fees - Rank and file organizer misrepresenting nature of fee structure to employee who did not sign card - Whether one or all of cards collected by organizer rejected

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *J. A. Ronson* and *S. O'Flynn*.

**APPEARANCES:** *D. A. McKee* and *Bruce Zufelt* for the applicant; *Thomas A. Stefanik*, *Frank A. Marshall* and *Ronald T. Sparks* for the respondent; *Helen O'Regan* and *John Moszynski* for the intervener.

**DECISION OF ROBERT D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER S. O'FLYNN;** January 10, 1986

1. The name of the respondent is amended to "Corporation of the Town of Dunnville".
2. This is an application for certification.

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*(Paragraphs 3-8 inclusive omitted)*

9. By the following letter dated July 16, 1985, counsel for the respondent notified the Board and the applicant of his client's intention to adduce evidence concerning certain allegations of improper membership solicitation by the applicant:

Please be advised that at the hearing of this matter the Respondent Employer intends to adduce evidence which has just come to its attention regarding improper membership solicitation by the Applicant Union. The particulars are as follows:



1. On or about the 24th day of June, 1985, one Betty Lambert, an employee of the Respondent in the proposed bargaining unit, approached three (3) bargaining unit employees of the Respondent. Ms. Lambert represented herself as assisting in organizing for the Applicant Union and indicated to the three (3) employees that if they signed membership cards now, it would only cost them one (\$1.00) dollar, but if they waited, it could cost them twenty (\$20.00) dollars at a future point in time. The Respondent Employer believes that as a result of those representations by Ms. Lambert, the three (3) bargaining unit employees in question signed membership cards in the Applicant Union.
2. On or about the 10th day of July, 1985, one Douglas Grey, an employee of the Respondent, approached an employee of the Respondent in the proposed bargaining unit of this Application. Mr. Grey represented that he was assisting in organizing for the Applicant Union and represented to the employee in question that if that employee signed before July 19th, it would only cost one (\$1.00) dollar but after that date, it would cost twenty (\$20.00) dollars if the Union was certified. In addition, Mr. Grey told the employee in question that if the Union was certified, the Union Members would get hired first for summer work and the Town would have to hire only Union Labour unless it was unable to find qualified Union Members to do all of its work.

The Respondent Employer submits that such conduct on the part of the Union Organizers amounts to misrepresentation/fraud and in the circumstances, asks that the Board dismiss the Application. In the alternative, the Respondent Employer will be seeking a representation vote even if the Applicant Union is in an apparent out right certification position.

10. At the continuation of hearing of this matter on October 11, 1985, the Board heard evidence from six witnesses concerning those allegations, and also heard oral argument by counsel for the respondent. On the agreement of the parties, the Board subsequently received written argument from counsel for the applicant, and written reply argument from counsel for the respondent.

11. The witnesses who testified before the Board were Patricia Forsey, who has worked for the respondent as a water safety instructor on a part-time basis for over twenty years; Chris Brownell, who worked for the respondent on a road crew during the summer of 1985 as a summer student; Tim Voakes, who worked for the respondent as a general labourer during the summer of 1985 as a summer student; Betty Lambert, who was at all material times employed by the respondent on a full-time basis as a public works clerk; Douglas Grey, who was at all material times employed by the respondent on a full-time basis as a cemetery attendant; and Bruce Zufelt, an organizer employed by the applicant's Ontario Retail Council.

12. The applicant's organizational activities in respect of the respondent's full-time employees commenced prior to the organizational activities which led to the instant application. The applicant's full-time application (File No 0055-85-R) was filed with the Board on April 9, 1985. The terminal date for that application was April 18, 1985. It came on for hearing (before another panel of the Board) on April 26, 1985. Some matters were resolved at that hearing, but a number of issues concerning the scope and composition of the bargaining unit remained in dispute. However, it was apparent that the applicant would ultimately be certified for some configuration of the respondent's full-time employees. (In an unreported decision dated May 27, 1985, that other panel of the Board appointed a Board Officer to enquire into the disagreement between the parties as to the description and composition of the bargaining unit. In doing so, the Board noted (at paragraph 5) "that regardless of how the bargaining unit questions are resolved, the trade union will be entitled to certification in respect of some bargaining unit".)

13. On May 14, 1985, Mr. Zufelt held a meeting with a number of the respondent's full-time employees, including Ms. Lambert and Mr. Grey, to advise them of the status of the full-time application, and to answer any questions which they had. One of the questions that Mr. Zufelt was asked at that meeting was how much it would cost an employee to join the Union after a collective agreement was put into place. In response to that question, Mr. Zufelt stated that anyone who had not joined the Union would be able to do so for one dollar until a collective agreement had been ratified. After that, the cost would be \$20.00. He also explained that all of the employees would be required to join the Union if the collective agreement provided for a "closed shop". Mr. Zufelt did not mention that the Union's initiation fee for part-time employees after ratification was only \$5.00, because he was speaking only to full-time employees that evening. In confirming that fee structure in his evidence before the Board, Mr. Zufelt noted that different locals have different bylaws concerning initiation fees, and that the fee structure described above is the one delineated in the applicant's bylaws.

14. While the applicant was organizing the respondent's full-time employees, a number of part-time employees approached Mr. Zufelt to express interest in unionization. Accordingly, he met with half a dozen of the respondent's part-time employees to enquire if they would assist in organizing the respondent's part-time work force. Having received a favourable response, Mr. Zufelt met with them again in mid June, and also met with certain full-time employees who had expressed a willingness to assist him in signing part-time employees into the Union. Included in that group were Ms. Lambert and Mr. Grey. At that meeting, Mr. Zufelt distributed membership cards, explained the proper procedures for signing persons into membership, and warned the persons in attendance that they were "not allowed to promise anyone anything", or to threaten or coerce anyone into joining. He also provided them with a brief explanation of the Board's certification procedures, and advised them to give his (toll free) telephone number to any employees who had questions, or to arrange for him to meet with them to answer their questions. No mention was made at that meeting of the applicant's two-tiered fee structure because Mr. Zufelt had been involved in previous Board proceedings in which allegations had been raised (by another employer) concerning references to that structure, and was therefore desirous of avoiding the possibility of any such allegations in respect of this organizing drive.

15. Shortly after July 9, 1985, which as noted above was the terminal date set by the Registrar for this application, Mr. Grey telephoned Ms. Forsey, who was one of his neighbours, to tell her that the Union had applied for certification as bargaining agent for the respondent's part-time employees. Mr. Grey, whom we found to be a candid and reliable witness, told the Board that he had merely called her as an act of friendship since he was aware that no one had contacted her concerning the Union, and "didn't want her to walk into it without knowing it was coming". In her testimony before the Board, Ms. Forsey described Mr. Grey as "a very nice, conscientious man" whom she gets along with well. Mr. Grey was aware at the time of that call that it would make no difference to the outcome of the Union's certification application whether or not Ms. Forsey signed a Union card since the terminal date had already passed. He was also aware that the Union had signed up more than fifty-five per cent of the respondent's part-time employees, and thus expected that the Union would be certified to represent those employees. It was Mr. Grey's evidence that during the course of that conversation, he told Ms. Forsey that it would cost her one dollar to join the Union at that time, but that after the contract was signed it was going up to \$20.00. Ms. Forsey's evidence was that Mr. Grey told her that it would cost one dollar then or \$20.00 after

July 19th. When Mr. Grey was advised in cross-examination of the discrepancy between his evidence and that of Ms. Forsey on that point, he said, "As far as I can remember, I said 'after the contract'. I may have mixed up the dates. I don't know." Under the circumstances, we are unable to determine whether it was Mr. Grey who was mistaken concerning this point or Ms. Forsey, who may well have been told by Mr. Grey that July 19 was the date on which the Union's application was to be heard by the Board and may have mistakenly linked that date with Mr. Grey's statement concerning the cost of joining the Union. Whichever version is correct, it is clear that Mr. Grey did tell Ms. Forsey that she could join the Union for one dollar at that point but that it would cost \$20.00 later. Mr. Grey also told her that if the Union obtained a contract, she would have to pay dues whether she joined the Union or not. When she asked him if she would have to pay dues throughout the year or just when she was working (during the summer months), he told her that he would have to get back to her on that because he did not know. After they had discussed the pros and cons of unionization, Ms. Forsey asked Mr. Grey if declining to join the Union would have any effect on her being hired by the respondent the following year if the Union was certified. (Pool employees such as Ms. Forsey are terminated by the respondent at the end of each summer and then rehired the following spring.) It was Mr. Zufelt's evidence that he responded to that question by saying that as far as he knew the Union members would be the first ones to be hired, provided their qualifications were good enough. He further testified that he told Ms. Forsey that he was not sure of that. Ms. Forsey's response was something to the effect that it did not matter because no one else had her qualifications. It was Ms. Forsey's evidence that Mr. Grey went on to say that if the places were not filled by Union people from Dunnville, they would probably bring in Union people from Welland. However, Mr. Grey firmly denied making any such statement and, having regard to all of the circumstances, we prefer his evidence on that point. In this regard, we are satisfied that Ms. Forsey was not attempting to mislead the Board, but rather was merely mistaken about that aspect of the telephone conversation (which is not mentioned in the brief contemporaneous notes which she made concerning that conversation). We further note that Ms. Forsey readily conceded that she did not have a "perfect recollection" of the call. During that conversation, Mr. Grey also suggested that since Ms. Forsey had worked at the pool for a long time, perhaps she could get the pool staff together to discuss the Union.

16. On or about June 11, 1985, Mr. Grey spoke to Mr. Zufelt and told him about his conversation with Ms. Forsey. When Mr. Zufelt learned that Mr. Grey had told Ms. Forsey that it would later cost her \$20.00 to join the Union, he advised Mr. Grey that he had given Ms. Forsey incorrect information. After explaining that under the applicant's fee structure a part-time employee would have to pay only \$5.00 to join the Union after a collective agreement was in place, he requested that Mr. Grey contact Ms. Forsey and correct the information which he had given her. He also asked Mr. Grey if he had told anyone else the same thing. Mr. Grey replied that he had not. In testifying before the Board in this matter, Mr. Grey confirmed that to the best of his recollection he had not mentioned the applicant's two-tiered fee structure to anyone except Ms. Forsey. In this regard, he told the Board that he did not approach any other employees about joining the Union; it was his evidence that each of the part-time employees whom he signed up came to him to get a card. It was also his evidence that he did not tell anyone else that Union members might be given hiring preference if the Union was certified as the bargaining agent for the respondent's part-time employees. He further testified that he was positive that Ms. Forsey was the only one who asked him about that matter.

17. Mr. Grey attempted to contact Ms. Forsey by telephone the same day that he spoke



to Mr. Zufelt, but was unable to reach her. He did, however, speak with her in person on the following evening, at which time he told her that the \$20.00 figure that he had given her was incorrect, and that it was only \$5.00 for part-time employees. During that conversation, Ms. Forsey confirmed that she did not wish to join the Union and also advised that she could not get the pool staff together to meet concerning the Union.

18. Ms. Lambert was also involved in collecting in respect of the instant application. She approached Mark Derjugin, a summer student employed by the respondent as a labourer, who in turn spoke with Chris Brownell, Tim Voakes, and his brother, Jim Voakes (who was not called as a witness in these proceedings as he had become a member of the Canadian Armed Forces, stationed in Cornwallis, Nova Scotia). At the suggestion of Mr. Derjugin, those four summer students went to Ms. Lambert's office (downstairs in the Municipal Building) after work on June 24, 1985 to discuss the Union with Ms. Lambert. There are some conflicts in the evidence concerning what was said at that meeting. In resolving those conflicts, we have generally given the greatest weight to the evidence of Tim Voakes. This is not to suggest that either Mr. Brownell or Ms. Lambert were attempting to mislead the Board. Rather, it simply reflects the fact that we are satisfied that Mr. Voakes was better able to recall what transpired than were Mr. Brownell and Ms. Lambert.

19. Those four students spent approximately ten minutes in Ms. Lambert's office that day. Although she was unable to recall doing so, we are satisfied from the evidence of Mr. Voakes and Mr. Brownell that Ms. Lambert told them (and the other two students who were present at that time) that they could join the Union by paying a dollar at that time and that it "could possibly" cost them more to join if they waited until later. In her evidence in chief, Ms. Lambert testified that she told them that she had a toll free number where they could contact Mr. Zufelt. However, neither Mr. Voakes nor Mr. Brownell had any recollection of being given that information, and in cross-examination Ms. Lambert expressed less certainty about that matter, ultimately conceding that she did not know whether she had given them that information or not. It is clear, however, that she had Mr. Zufelt's card in her purse and that she would have provided them with his toll free number if they had expressed interest in obtaining further information.

20. Following that discussion, each of the four students paid Ms. Lambert a dollar and signed a membership card. In explaining why he joined the Union at that time, Tim Voakes told the Board, "I figured I'd be able to save myself some money. I thought that if the Union got in, I'd probably have to join. So I joined then. It cost me a dollar." Mr. Brownell also testified that he joined then because Ms. Lambert led him to believe that it would cost him more later and he wanted to take the "cheapest way". However, the reliability of that evidence is cast in some doubt by the fact that he also testified that he signed the card before any discussion took place.

21. In addition to those four cards, Ms. Lambert served as the collector on two other membership cards submitted by the applicant in support of this application. It was Ms. Lambert's evidence that she did not say anything to those other two employees about the Union's two-tiered membership fee structure. When counsel for the respondent suggested to her in cross-examination that she might have made such a statement to them and then forgotten having done so, Ms. Lambert expressed strong disagreement and went on to state that she treated each person that she talked to individually. In this regard, it was her evidence that the others were quite willing to join and, unlike the aforementioned four students, asked her no questions whatsoever.

22. The Board's decision in *Leon's Furniture Limited*, [1982] OLRB Rep. March 404, contains a thorough review of the Board's jurisprudence concerning two-tiered membership fee structures. Reference may also usefully be made to *Haughton Graphics Limited*, [1983] OLRB Rep. Sept. 1464, in which the Board wrote, in part, as follows:

10. The real issue in this cases centres around the applicant's use of the two-tiered fee structure in the campaign. Such usage was also the main focus in the *Leon's Furniture Limited* case, *supra*, and the Board noted, at paragraph 11:

... The Board has not attempted to lay down standards of conduct aimed at responding to confusion and misunderstanding. Rather, it has tried to strike a balance between competing interests by censuring conduct that could deter, coerce or mislead the reasonable employee. The reduced payment before certification has been viewed by the Board as a borderline tactic which has sometimes crossed the line of acceptability.

After reviewing its jurisprudence on the subject, and particularly the case of *Alex Henry*, [1977] OLRB Rep. May 288, the Board concluded:

20. While [in *Alex Henry*] there had been no explicit linking of the higher initiation fee to an employee's job security, the Board found that an employee might reasonably see this link and therefore held that the full-time union organizer is under a duty to explain in detail how his statement might come to pass. Once having raised a topic that relates to job security and amounts to a significant financial enticement, there is an affirmative obligation on the organizer to be totally candid. Therefore, in *Alex Henry* the Board concluded that the bald statement "\$2.00 now or \$50.00 later" crosses the boundaries of acceptable salesmanship. However, instead of prohibiting a two tier initiation fee structure for the purposes of an organizing campaign, the Board has instead required complete disclosure on how it would impact on the employee who refuses to sign a membership card *before the trade union is certified*. This, it seems to us, is a reasonable approach given the reality that many trade unions customarily reduce their initiation fees for the purposes of organizing campaigns.

[emphasis added]

11. The basis of the Board's concern is set out in plain terms in an earlier portion of the decision:

11. The statute permits the Board to certify applicant trade unions to represent employees based upon written authorizations involving the payment of at least \$1.00 where such "membership documents" are properly executed and witnessed and where the application is supported by a declaration made by a knowledgeable official, declaring that the monies were paid as the membership documents indicate. See for example Form 9 and sections 1(1)(l) and 103(2)(j) of the Act. Thus, the Board relies on the execution of such membership evidence as an indication of the true wishes of employees and where more than 55 percent of the employees in the bargaining unit are members of the trade union, the Board will usually certify the applicant without a representation vote. However, because of the "hearsay" quality of membership cards, a fact demanded by the membership secrecy section of the Act (see section 111(1)), conduct by organizers that obscures the primary reason why an employee signed a membership card is of concern to the Board.

The Board accordingly sent a clear signal that a "special" initiation fee to eliminate the financial impediment to organizing would continue to be acceptable; but not to the point where the same device may be held out as a threat of a "penalty" to those employees who would refrain from joining prior to the union becoming certified. The union, in other words, must

not use this organizing tool in such a way as to cause the Board to doubt whether employees have joined the union of their own free choice, or simply as insurance to avoid the risk of being required to pay the full amount of the initiation fee if the union is successful. The proper question is whether the employees wish to become part of the trade union or not, and organizing campaigns ought to be won or lost on this basis. Any two-level system of initiation fees causes a problem for the Board so long as the higher level is made to apply *before or immediately upon certification* of the trade union. In order to prevent this organizing device from being a distorting factor in assessing employees' true wishes, the two-tiered system must allow all employees employed at the time of the organizing campaign a reasonable opportunity to join for the lower fee *after* it has been determined whether the union will be certified. This is recognized to be already the practice of at least certain of the trade unions in the province, and conformity to it by others would seem to be no more than the Act requires ....

23. The Board's jurisprudence in this area has generally distinguished between statements made by full-time union organizers and statements made by rank and file employees. As indicated above, where reference is made to a two-tiered fee structure by a full-time union organizer, the Board has held that the organizer is under an affirmative obligation to make full disclosure. However, the Board has been careful to avoid imposing an unrealistic standard for accuracy and disclosure on rank and file organizers. For example, in *Hancock Sand & Gravel Limited*, [1978] OLRB Rep. Oct. 928, the then Chairman of the Board wrote:

15. The Board considers that it would be unrealistic to expect the same standard from the rank-and-file organizer as from the full-time union official. It is reasonable to assume that the ordinary employee is less conversant with the operation of union security provisions. If less than a full explanation is provided by him, moreover, its impact upon other employees is likely to be less than where the statements of a full-time union official suffer from the same defect. As the Board indicated in *Crenmar Services Limited*, [1978] OLRB Rep. Jan. 48, the rank-and-file organizer is not likely to be perceived by his fellow employee as being in a position to seek to achieve the consequences of any statements he may make during a union organizing campaign. Where employees discuss the merits of joining a union among themselves, it does not seem unreasonable to expect that a few misconceptions might arise, some lending support to the union and some working the other way. We consider that employees are quite capable of dealing with such misconceptions by seeking any necessary clarification, and then making an informed decision as to whether they wish to join a union.

(See also *Bond Structural Steel (1965) Ltd.*, [1979] OLRB Rep. Dec. 1137.)

24. The present applicant's two-tiered membership fee structure conforms to the Board's requirements, as described in *Haughton Graphics Limited*, *supra*, in that it allows all persons employed at the time of the organizing campaign a reasonable opportunity to join for the lower fee after it has been determined whether the Union will be certified. What is in issue, however, is the manner in which Mr. Grey and Ms. Lambert have communicated that structure to some of the employees affected by this application.

25. Mr. Grey was the collector on nine of the thirty-one membership cards submitted by the Union in support of this application. Counsel for the respondent submitted that in the circumstances of the present case, the Board should direct that a representation vote be taken, or at least disallow all of the cards collected by Mr. Grey. However, we are not persuaded that either of those courses of action would be appropriate in this case. As indicated above, we found Mr. Grey to be a candid and credible witness. Thus, we accept his testimony that Ms. Forsey was the only person to whom he mentioned (what he understood to be) the Union's two-tiered fee structure. As noted above, Mr. Zufelt asked Mr. Grey if he had mentioned that to anyone else, and was told by Mr. Grey that he had not. If Mr. Grey had in fact done so, it seems probable to us that he would have told Mr. Zufelt about it at that time, and would



then have contacted any such employee to correct the misinformation, as he did in the case of Ms. Forsey. The unlikelihood of his having made a similar statement to any of the part-time employees for whose cards he acted as collector is also confirmed by the fact that they approached him and asked for cards. Thus, he did not have to approach them or attempt to persuade them to join the Union. We are also satisfied that he did not tell any of them that Union membership might enhance their prospects of being rehired the following summer. In this regard, we accept his evidence that Ms. Forsey was the only person who asked him about that matter. Thus, he would have had no reason to mention that information to any of the aforementioned nine part-time employees who approached him and asked to sign membership cards. His statements to Ms. Forsey had no bearing on the applicant's membership position; they were not made until after the terminal date, and Ms. Forsey did not in any event sign a Union card. It is also significant that Mr. Grey was not a full-time organizer but rather was merely a rank and file employee who was speaking to Ms. Forsey as a friend and neighbour. That he was not the source of all wisdom concerning the Union was apparent to Ms. Forsey since he was unable to answer her question about the period during which Union dues would be payable by part-time employees. In this regard, it will be recalled that he had told her that he did not know the answer to that question and would have to get back to her on it.

26. For the foregoing reasons, we are not persuaded that a representation vote should be directed on the basis of Mr. Grey's words or actions, or that we should disregard any of the membership cards which he collected.

27. In the circumstances of the present case, it is unnecessary to determine whether Ms. Lambert's statement to the aforementioned four summer students (that they could join the Union for a dollar at that time and that it "could possibly" cost them more if they waited until later) would prompt the Board to discount any (or all) of the six membership cards collected by her, since even if all six of those cards were to be completely disregarded, that would not change the fact that the remainder of the membership cards submitted by the Union in support of the application constitutes unequivocal membership evidence in respect of more than fifty-five per cent of the employees in bargaining unit #1 at the pertinent time.

28. It is the applicant's position that Darren Glenney should be added to the employer's list, and that Tony Stratton (whose name appears on Schedule D of the employer's list) should also be included for purposes of the count. The respondent, on the other hand, contends that Mr. Glenney quit his employment prior to the date of this application, and that Mr. Stratton is properly excluded from the count under the Board's "thirty/thirty" or "one month" rule (as described in *Brewers Nursing Home*, [1981] OLRB Rep. July 852). However, it is unnecessary to resolve those disputed matters in the circumstances of the present case as they do not materially affect the count.

29. For the foregoing reasons, having regard to all of the evidence and the submissions of the parties, the Board finds that more than fifty-per cent of the employees of the respondent in bargaining unit #1 at the time the application was made, were members of the applicant on July 9, 1985, the aforementioned terminal date fixed for this application and the date which the Board has determined, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

30. We further find that there are no circumstances in the present case which make it appropriate, in the exercise of our discretion under section 7(2) of the Act, to direct that a representation vote be taken in respect of that bargaining unit.

31. Accordingly, a certificate will issue to the applicant for bargaining unit #1.

**DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. I approach the issues in this case with the same degree of credulity as the Board usually reserves for statements made by an employee who is perceived to be a manager or supervisor by other employees during a certification application.

2. It is clear that Mr. Grey and Ms. Lambert were “the Union” in the eyes of the employees whom they organized. There was no opportunity, (as in *Haughton Graphics Limited, supra*) for employees to ask questions of a union official and thus resolve any problems.

3. Both Mr. Grey and Ms. Lambert misled employees with their statements about the cost of joining the union. I feel that they used the misrepresentation as a selling point for all employees because:

1. Both of them made the statements as a matter of course in general conversation selling the benefits of the union; and

2. Mr. Grey made his statement to an employee *after* the terminal date of the certification application; - when her card was not needed to support the certification. If he made the statement at that time, it is more than probable that he made it previously to other employees whose cards were vital to the certification. In saying this I assume the same healthy skepticism as the Board usually reserves for its consideration of statements made by management or persons perceived to be acting on its behalf, and the self-serving testimony that usually follows.

4. I would order a vote to give the employees the opportunity to indicate their wishes free from any taint of misrepresentation.

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**3455-84-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), Applicant, v. Highbury Ford Sales Limited, Respondent, v. Group of Employees, Objectors**

**Bargaining Unit - Dispute whether warranty clerk and service cashier employed at auto service operation included in production unit - Board finding community of interest with office employees - Excluded from production unit**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *P. J. O'Keeffe* and *J. A. Ronson*.

**APPEARANCES:** *Lorna J. Moses* and *Howard Powers* for the applicant; *D. W. Morgan*, *David E. Keeler*, *J. J. Vitali* and *M. E. Geiger* for the respondent; *F. Glenn Jones* and *David Scott* for the objectors.

**DECISION OF THE BOARD; January 16, 1986**

1. In an earlier decision of the Board dated April 13, 1985, before a differently constituted panel, the Board determined that the appropriate unit of employees was "all employees of the respondent in London, Ontario, save and except tower operators, managers, service advisors, foremen, persons above the rank of foreman, office and sales staff". In that decision, the Board noted that the applicant had challenged the list of employees filed by the respondent. The applicant submitted that Dianna Wilson Rose, warranty clerk, and Debbie Agnew, service cashier, were employees in the bargaining unit. The respondent submitted that Ms. Rose and Ms. Agnew were office staff and were therefore excluded from the bargaining unit. The Board appointed a Labour Relations Officer to inquire into and report back to the Board in relation to the duties and responsibilities of Ms. Rose and Ms. Agnew in order to determine whether either or both of them are part of the respondent's office staff. The report of the Labour Relations Officer is dated June 28, 1985, and this matter was listed for hearing for the purpose of entertaining the representations of the parties on the report on October 30, 1985.

2. The respondent is in the business of the sale and servicing of trucks and cars and consists of a number of departments, namely, sales organization, fleet leasing sales, service department (which is divided into the mechanical shop and the body shop), parts department and a general accounting office. The employees who are affected by this application are employees in the service department and the parts department, together with four employees who are employed at a Texaco service station, which forms part of the respondent's operations. In the general accounting office there are approximately eight to ten employees. These employees are excluded from the bargaining unit. Ms. Agnew and Ms. Rose are, respectively, cashier and warranty clerk. The dispute between the parties over the inclusion or exclusion of Ms. Agnew and Ms. Rose centres around whether their community of interest lies with the employees in the general accounting office, which would lead to their exclusion from the bargaining unit, or whether their community of interest lies with the employees in the service department and parts department and the Texaco service station. The respondent's premises are on Highbury Avenue in London, and consist of operations on two floors. On the second floor there are a number of offices occupied by the president, the vice-president of financing and administration and other employees of the respondent, together with a general office where



the general accounting staff works, a board room, a computer room, a supply room, a washroom for the employees on the second floor, a mechanics' washroom and a lunchroom for the mechanics. Within the confines of the second floor, there is a stairway down to the main or first floor. In the immediate vicinity of the staircase there is a waiting room for customers who require service, two offices, a body shop office, a washroom, a small office used by Ms. Rose, a desk behind which Ms. Agnew deals with customers, a retail parts section, a computer office, parts counter, a control tower and kiosk where orders pass from the cashier to the control tower operator, who, in turn, arranges for the production of parts and the assignment of particular tasks to the mechanics employed by the respondent. Also on the first floor there is a body shop, a mechanical shop, a tool room, a storage area and three bays used for washing vehicles, front-end alignment and lubrication. All of the office employees in the general accounting office work on the second floor and Ms. Agnew and Ms. Rose, who are the two persons in dispute, work on the first floor.

3. Ms. Agnew has been employed by the respondent as a cashier since May of 1984. Previously, she worked at the Texaco station for a four-year period. She regards Dennis Morgan, the service manager, as her immediate supervisor, together with Ron Rancier, the vice-president of finance and administration. Mr. Morgan works on the same floor as Ms. Agnew. Mr. Rancier works on the second floor. Her job as a cashier is to write up the work orders, file them and answer the telephone. When a customer comes on to the premises, the customer is met by a service advisor who discovers the problem which the customer is experiencing with the car. The mechanics do the work and the work order goes to the control tower. The control tower operator gives the work orders to Ms. Agnew. She gets most of her work from the tower. However, she also gets some work from Phil Vitali, the manager at the Texaco station, with respect to safety checks on cars or the pre-delivery inspection of cars. She goes to the control tower if she is uncertain how the time spent on a car is being split by the mechanics on various jobs, or if she is not sure about the retail warranty or parts. This uncertainty happens almost every day. Once the car has been serviced by the respondent, the customer comes to Ms. Agnew to collect the car and receives the keys to the car in exchange for payment for the job. She may have to speak to the service advisor regarding an explanation of the bill to the customer. She answers the telephone for the service advisors if it rings more than three times. This happens about ten times a day. Ms. Rose answers the phone for the service advisors an equal number of times. Ms. Agnew feels competent to answers inquiries about minor jobs, such as oil filter changes and quotes prices. She feels that money differentiates minor jobs from major jobs. She is able to make appointments in the appointment book at the service desk for major or minor jobs for someone to bring in a car for servicing. Basically, she can give an explanation for a bill, but does not feel she is able to give an explanation for the time actually spent on the various items. She receives telephone calls from customers who want to know beforehand if the car is ready, and on these occasions she checks with the control tower. Ms. Agnew collects cash and credit card payments, puts it into an envelope where Ms. Rose checks it and hands it to Sue Price, who works on the second floor. Ms. Price then gives the information to the keypunch operator who punches the information into the accounts records. Ms. Agnew has contact with the manager of the body shop, Roy Boyle. He brings in the work order and she answers his phone if he is not in the office. She is able to take cash from his customers and sometimes she can answer queries and give information when he is not there. She sees the manager of the body shop at least five times a day. The contact with Dennis Morgan, the service manager, occurs when he authorizes charges and sometimes she will ask him to speak to customers regarding work orders that he writes up. She sees him once or twice a day. She sits at the front of the service department

next to the waiting room, some thirty feet from the mechanical shop and some sixty feet from the body shop. There is a physical separation between Ms. Agnew and the other areas of the first floor. She goes upstairs with the white copies of the work orders and gives them to Sue Price. On occasions she makes photocopies of work orders using the machine on the second floor. The white copies of the work orders are filed in an area on the second floor. She does not have to go upstairs very often to check for retail forms, and she does not go into the mechanical shop very often. She may go to the body shop to find a work order. She never goes to the tool room or storage place. She goes to the control tower to get keys and to see if a car is ready.

4. When she was away on holidays, no one from the general accounting office worked on her job. However, where she has made a mistake, someone from the general accounting office will come down and ask her to go up and explain the discrepancy or correct it. Sue Price might phone if she has a cheque and is trying to match it up with a work order. If she has made a mistake on the work order, the keypunch operator on the second floor will ask her to correct the mistake on the order. Ms. Agnew has contact with the keypunch operator and the accounts receivable clerk once or twice a week. Where a customer has a complaint about the time spent on the labour portion of the mechanical job, Ms. Agnew would contact the service advisor. When she asks for occasional time off, or is reporting late, or is sick, she would usually report to Dennis Morgan, the service manager, or make sure that he knows. She works from 9:00 a.m. to 6:00 p.m. on weekdays and from 8:00 a.m. to 2:00 p.m. on Saturday. Her lunch break is from 1:00 p.m. to 2:00 p.m. on weekdays. When she is at lunch Ms. Rose, the warranty clerk, covers for her and if it is a busy day and she has more than one customer, Ms. Rose, the warranty clerk will also help her. On the other hand, Ms. Agnew does not cover for Ms. Rose. The work orders and paperwork originate from various places in the service department. None of the paperwork originates from the general accounting office on the second floor. She speaks to Phil Vitali about the internal work orders from the Texaco service station. She does not use a computer or a typewriter. She does use a phone and an adding machine and occasionally the photocopying machine on the second floor for about one hour each month.

5. The appointment book is on the service desk, which is located between the control tower and the waiting room. Some sixty to eighty cars pass through the service department each day and Ms. Agnew makes appointments two to four times a day. The rest of the appointments would be made by the service advisors, other than two per day, which are made by Ms. Rose. It is not part of her normal duties to fill out work orders. She charges out the labour hours and costs out how much the mechanic is getting paid and totals up the amount of labour. Her salary is \$200.00 per week and she was informed by the service manager what her pay would be. When she was working at the Texaco service station, Mr. Morgan asked her if she wanted the job as cashier. She arranges her holidays with the service manager. In her view, she has never really dealt with Mr. Rancier and has never really talked to him about her pay. However, Mr. Rancier does tell her what to do sometimes. The mechanics start work at 9:00 a.m. and finish at 5:00 p.m. Sometimes they work nights. Ms. Agnew works until 6:00 p.m. in order to be available for the customers who work late. Ms. Agnew has received no training and has no knowledge of mechanics or of the parts that are used in the servicing work. When Ms. Agnew is off sick, she is replaced by Ms. Rose. Ms. Agnew deals with service advisors and tower operators rather than with mechanics.

6. Ms. Rose has been employed by the respondent for one year and five months. She



was formerly the cashier and then became warranty clerk/computer input. She works as a warranty clerk in the morning and as the computer input in the afternoon. Mr. Morgan is her immediate supervisor and as warranty clerk, she receives claims, fills them in, so that they are ready to be sent to Ford. As the computer input, she takes service work orders and inputs into the system what was done to the vehicle. Claims which originated from and were written up by the service advisors are at the desk when the customers arrive with their problems. The work which is to be done for the customers is either marked up as retail or as warranty. Ms. Rose handles only the warranty items. The warranty work does not go into the computer. She comes into contact with service advisors, the control tower operator and with some of the mechanics. She deals with Mr. Morgan if she has any problems. She sees the control tower operator just a few times if there is any problem with the warranty form and sees the control tower operator if she has to decide if an item is a warranty matter or whether the customer should be paying for it. She sees the control tower operator once or twice a day. If she has problems with a warranty she would ask Mr. Morgan with respect to the time allotted for the item or what has been done. She does get warranty work from the body shop and the body shop manager generally brings the order to her. If she has any problems on this, she sees the body shop manager. Other than that, she has no reason to see him. When she has finished with the warranty papers she gives them to Mr. Morgan, who sends them to Ford. While she works on the first floor, she goes to the second floor to make photocopies and, in the morning, Ms. Rose and Ms. Agnew take the cash and receipts to the second floor. The personnel in the general accounting office on the second floor come to see Ms. Rose if there is a problem with the work order. This happens about once every week or so.

7. Ms. Rose works from 8:30 a.m. to 5:00 p.m., with lunch from 12:00 to 1:00 p.m. or 1:00 p.m. to 2:00 p.m. She looks after the cashier function during Ms. Agnew's lunch break and comes in earlier in the morning than does Ms. Agnew and handles any customers who come in before 9:00 a.m. She does not use a typewriter. She uses an adding machine and a computer terminal which is hooked up to the computer which is situated on the second floor. She inputs all repair orders for work done on each customer's vehicle. She uses the computer about three to four hours a day. She does not receive any work from the personnel upstairs. Most of her work originates from the service advisors. She would have something to do with the work order, only if there was a problem, such as whether an item was covered under the warranty. Where there is a faulty radio, she takes the claim back with the radio to the parts department and has them ship it back to Ford. She is paid on the basis of a salary and a bonus. The salary is \$170.00 per week, which is paid monthly and the bonus is one per cent of the warranty work which goes through and is paid by Ford each month. This amounts to about \$250.00 per month. She answers her own telephone and if the service telephone rings more than three times, she answers it. Ms. Rose also answers the telephone of the service manager and the body shop if it rings more than six times. She relays messages to the manager of the body shop. She does not process any paperwork for the Texaco station. Her direct supervisor is Dennis Morgan. Ms. Rose has never been reprimanded by Mr. Morgan and when she first started work as a cashier, she reported to him. She goes to the mechanic shop once or twice a day and talks to the mechanics and goes to the body shop perhaps once a week. Sometimes she goes into the garage. No one from the second floor general accounting office looks after her work while she is absent or on vacation. She has never been told what her duties would be and, as far as she is aware, she is not the only one to get a percentage bonus. By personal preference, she does not use the lunchroom on the second floor.

8. When Ms. Rose first came to the respondent she was interviewed by Mr. Rancier.



No one else interviewed her. He told her what she would be paid at that time. He said she would be talking to Mr. Morgan about any problems. She uses the warranty book because it's an operations code. The problems that she has mainly would be whether or not there is an operations code under the warranty manual for a particular operation. Her fundamental duty is to obtain payment for warranty work from Ford. When she speaks to mechanics it is to get the correct code to put on the form. She does not remember whether she was told by Mr. Rancier that Mr. Morgan was not her supervisor. When she obtained an increase in salary, both Mr. Rancier and Mr. Morgan told her. She has discussed the quality of her work with Mr. Morgan, but not with Mr. Rancier. She saw Mr. Morgan about her holidays and then Mr. Rancier because she wanted more holidays than she was allowed. Both men had a say in her taking holidays. She has no occasion to speak to mechanics other than to clarify information or to fill out a warranty form correctly. Some customers require photocopies of invoices and for this purpose she goes upstairs to use the photocopy machine. Every couple of days she goes upstairs and files bills of lading. She works between eleven and twenty feet from the stairs to the second floor and she would be the same distance from the service desk. The orders are placed in the revolving kiosk at the control tower. Mechanics obtain the order and the parts department gets the parts. She has basic mechanical knowledge but is not qualified to do anything mechanical.

9. George Vitali has been the president of the respondent for ten years. He describes Ford as his immediate supervisor. The respondent is divided into five departments: the sales organization, which is not affected by this application, the fleet leasing sales department, which has two employees and is not affected by this application, the service department, which is divided into the mechanical shop with thirty to thirty-five employees and the body shop with eight employees, the parts department, which is affected by this application, and the general accounting office with approximately eight to ten employees. By the terms of the agreed bargaining unit, the office staff is excluded from the bargaining unit. In addition, the respondent operates a Texaco service station, which has four employees including a manager. There is a full-time employee in the kiosk and a number of part-time employees. All of the employees at the Texaco service station are included in the bargaining unit except the manager Phil Vitali. The general accounting office consists of the following classifications: accounts payable, vehicle accounting, data processing, leasing files and mechanics' payroll, accounts receivable, switchboard operator (who does some clerical work for vehicle sales), office manager and manager of finance and administration. There are also the two classifications which are in dispute, namely, cashier and warranty clerk.

10. The functions of the employees who are included in the bargaining unit in the service department and parts department may be described as the servicing of vehicles, that is to say, repairing and dispensing parts in order to effect the repairs. The functions of the employees in the general accounting office are to account for and to pay out money owed by the respondent, collect money owing to the respondent and to detail it from an accounting point of view. According to George Vitali, the jobs of the employees in dispute are part of the accounting function in the sense that they produce the paperwork necessary to account for the costs incurred and the sales to be billed and accounted for through the respondent's books.

11. It is useful to consider the work of the employees in the bargaining unit from the time when the customer comes into the service reception area and speaks to the service advisor. The customer describes a problem and the service advisor translates these problems on to a work order. A decision is made as to which services are to be paid for by the customer and

which are to be paid for by Ford as warranty work. The order is written and one copy goes to the control tower and the remaining copies (known as soft copies) go into a parts department. The hard copy is the mechanic's copy and is handled by the control tower operator. He gives the hard copy to the mechanic after he has analyzed the work which is required and has scheduled the work with a mechanic. To the extent that is required, the work is supervised by the shop foreman. The mechanic time punches on and off the job and returns the work order to the control tower. The mechanic is paid according to a schedule of times for each portion of the job he does. The mechanic writes on the work order what he has done. The soft copies in the parts department are there so that when the mechanic requires a part he goes to the back counter in the parts department and asks for the part. As the parts are dispensed they are charged out on those soft copies. When the job is finished, the hard copy has the mechanic's notes on it and the time tickets are affixed to the back. This is necessary so that the mechanic can be paid for the work performed. The soft copies are retrieved from the parts department and they are put together and, in effect, they are re-assembled as in the original work order package. Now they have to be processed in an accounting fashion. This includes the number of hours that have to be charged out in the job as retail costs for the customer. The cost of parts supplied also has to be added up. The comments of the mechanics have to be translated on to the soft copy so that the customer can see what has been done and what he has been charged for. These functions are done by taking the re-assembled work order, putting it in an air chute which extends from the control tower to the cashier's office.

12. The cashier assigns labour costs. If the customer is to pay these costs, the cashier takes the work order and fills out those portions that deal with the customer's costs. She assigns the costs to specific account numbers on the work order and assigns sales amounts to different account numbers. She then adds up the totals on the work order and determines the amount of sales tax that has to be added to the bill and the amount to be sent off to the sales tax department. The cashier explains to the customer the work which was done and if more explanation is required by the customer, she will ask the service advisor, the shop foreman or the service manager. If a warranty component is involved in the work this would have to be quoted as "W" on the work order as opposed to "R" for retail. This is where the warranty clerk receives the work order and she performs essentially the same process, except that Ford requires that the billing for warranty work and warranty parts be done in a specific fashion in accordance with Ford's warranty policy manual. The warranty clerk finalizes the orders, asks the service manager to sign them and sends them to Ford. The cashier and warranty clerk may have questions that have to be answered by the service advisor, the control tower operator, the foreman or the mechanic. In preparing these documents, it may be necessary to get supporting information from the general files in the general accounting office. The cashier and warranty clerk may have to produce photostats of invoices from the general accounting office. The warranty clerk keypunches the work orders on to the computer so that the respondent has a complete record of work performed on each vehicle.

13. The work in the general accounting office consists of work performed by the various employees in that office. The accounts payable clerk opens the day's mail, pays the accounts, handles purchase orders, reconciles money and purchase orders, assigns costs to various accounts, prepares cheques for signature by the departmental manager and puts information into the computer. The vehicle accounting clerk receives vehicle sales documents from the vehicle sales department, assigns costs to cost account numbers for new, used and reconditioned cars, data processes the documents and puts information into the computer. The



data processing clerk does the data processing for parts, sales slips and vehicle work orders. She makes the bank deposit each day and goes to the vehicle registration departments and obtains vehicle licences. The leasing clerk handles the accounting for the leasing files, for the mechanics' payroll, does the insurance coverage, makes sure the files are up to date, handles the mechanics' time tickets which come from the service department, feeds the paper hours into the computer so that the computer produces the appropriate paycheques. The accounts receivable clerk ensures that customers pay their accounts with the respondent in a timely fashion. The switchboard operator works in the showroom. She assigns vehicle identification numbers to the new cars and produces photostats of the necessary documents and distributes the necessary paperwork, either to the vehicle sales manager or into the accounting office. She types quotations for the fleet and leasing representatives. She prepares and types out the lease agreements, answers the telephone and assigns calls to departments. The office manager is an accountant who ultimately produces an overall statement of the operations and identifies accounting problems. The vice-president of finance and administration oversees the entire function and has the responsibility for hiring staff and seeing that the accounting functions get done properly. All of the persons in the general accounting office report to the vice-president of finance and administration.

14. According to the organization chart of the respondent's business, the cashier and warranty clerk report to Ron Rancier, the vice-president of finance and administration. Within the bargaining unit, employees are hired by the respective managers in their departments. In the general accounting office, the vice-president of finance and administration hires them, including the cashier and the warranty clerk. He promotes them, terminates them and evaluates them. The respective managers grant time off to employees in the bargaining unit. However, the vice-president of finance and administration grants time off in the general accounting office and for the two classifications in dispute, namely, the cashier and the warranty clerk. The vice-president of finance and administration grants leaves of absence to the two employees in dispute and also for employees in the general accounting office after consultation. The salaries in the general accounting office and for the cashier and warranty clerk are set by the vice-president of finance and administration in conjunction with the general manager.

15. With respect to the employees in the bargaining unit, the body shop is staffed by technicians who are licenced by the government of Ontario. The employees in the mechanical shop are licenced, for example, the diesel mechanic, the front-end alignment man, the tune-up man, and general mechanic and the apprentices. All require qualifications to perform their work. While in the parts department there is no licencing arrangement, the employees in the parts department require a depth of knowledge and an understanding of the intricate and complex numbering used for parts. At the service station the mechanic on staff is licenced, but there is no need for a licence to perform oil changes. The employees who operate the kiosk for the gas pumps are not licenced. In addition to their kiosk duties, they wash out the washrooms and in the kiosk they make out sales slips and collect money.

16. The skills exercised in the general accounting office are, for the most part, accounting skills. If the cashier is absent, the respondent could send one of the employees from the general accounting office to substitute. The skills, in the view of Mr. G. Vitali, between the general accounting office and the cashier are interchangeable. In the bargaining unit the employees use tools, tool boxes, a lathe and a welding torch. On the other hand, the office employees use adding machines, a data processing terminal and a telephone. Employees in the bargaining unit do not replace either the employees in the general accounting office or



the cashier or the warranty clerk. Employees in the general accounting office could replace the cashier in the case of illness or vacation, but this does not happen very often. There is no replacement plan operating in the opposite direction.

17. In the body shop the employees work five days a week from 8:00 a.m. until 5:00 p.m. In the mechanical shop they work the same hours, but there is also an afternoon shift until 10:00 p.m., and two mechanics work on Saturdays between 8:00 a.m. and 2:00 p.m. In the parts department the hours of work are 8:00 a.m. to 5:00 p.m. with a representative who is there in the evenings to look after the afternoon shift and the Saturday shift in the mechanical shop. The Texaco station operates from 8:00 a.m. to 6:00 p.m. on weekdays and from 8:00 a.m. to 2:00 p.m. on Saturdays, with the gas bar being open from 7:00 a.m. to 11:00 p.m., seven days a week. The employees in the general accounting office work from 8:30 a.m. to 5:00 p.m., five days a week.

18. As stated earlier, the cashier works from 9:00 a.m. to 6:00 p.m., five days a week, and from 8:00 a.m. to 2:00 p.m. on Saturday. The warranty clerk works five days a week from 8:00 a.m. to 5:00 p.m. The employees in the general accounting office and the two classifications in dispute are paid when they are absent. The respondent has three payrolls and the cashier and warranty clerk are paid on the payroll for the general accounting office. The cash or credit card slips from the Texaco station go to the general accounting office. The attendants at the gas station are paid an hourly rate. When Ms. Agnew worked at the Texaco station, she was interviewed by the vice-president of finance and administration and other people and hired and promoted by the vice-president of finance and administration. The hours of work of the warranty clerk and the cashier are offset for the purposes of covering each other. The cashier was initially assessed by means of an interview, a wonderlich test, which tests the ability of the individual to think logically and by a productive index. After being interviewed by the vice-president of finance and administration, she was not interviewed by anyone else. A comparison of the salaries shows that the vehicle leasing and accounting clerk receives \$300.00 a week. The accounts receivable clerk receives \$325.00 a week. The switchboard operator receives \$185.00 a week. The data processing clerk receives \$187.00 a week. As stated earlier, the cashier receives \$200.00 a week and the warranty clerk \$175.00 a week, plus a monthly bonus of about \$250.00. The warranty clerk could do the data processing job in the general accounting office in the view of Mr. G. Vitali.

19. Clerical workers physically located in or immediately adjacent to the plant rather than in the main or general office and whose main function is to service the plant, for example, foremen's clerks, production clerks, shipping and receiving clerks are normally included in a plant unit on the ground that their community of interest lies with the employees in the plant rather than with the office employees. This practice was described in *Wakefield Lighting Limited*, [1965] OLRB Rep. May 143, where the Board stated at page 144:

It is a well established practice of the Board in determining the appropriateness of bargaining units of persons engaged in production as distinguished from the office bargaining units, to include in the production units employees in job classifications such as production schedulers, expeditors and material control clerks. These classifications may be included in the general description of "Plant Clerical Staff".

It is the Board's practice to include plant clerical staff with the production unit because of such factors as common supervision, the fact that they directly service the production unit, they are commonly associated with the production unit and in general their community of interest is with that unit. This functional coherence and interdependence is the reason for

including such classifications in the unit determined by the Board to be appropriate in this matter.

The applicant relied on the decision of the Board in *Domtar Chemicals Limited*, [1968] OLRB Rep. Oct. 719. In that case, the Board found that having regard to the evidence before it a person classified as a stockroom clerk and a person classified as an assistant stockroom clerk were engaged in the performance of functions which serviced the production employees for whom the applicant was the bargaining agent. The Board found that while the two employees were under the supervision of the office manager, they were physically located adjacent to the production workers, some 200 yards from the office employees. The Board also stated in that decision that while the two employees had some of the same benefits enjoyed by the office workers, their community of interest lay with the production workers, since they were daily associated with them in the performance of their duties and that their duties were performed as a service to the production employees. For these reasons, the Board found that even though their interests were not entirely divorced from the office employees, their main community of interest lay with the production employees and that, accordingly, they formed a tag end to the production unit that would not be appropriate for inclusion in a unit of office employees.

20. The Board notes that there are some differences between the facts in the instant case and the facts in *Domtar Chemicals Limited*. First of all, the cashier and the warranty clerk are not located 200 yards from the general accounting office. They are located on the first floor beneath the general accounting office and are approximately the same distance from the general accounting office as from the employees in the parts department, the mechanics, the mechanical shop and the body shop. Moreover, while it may be said that they perform duties with the production workers, their task is clerical and the flow of the administration work is with the employees in the general accounting office. The natural progression and the interchange of skills between the two disputed categories lies with the general accounting office and not with the bargaining unit. The progression and the flow of the work indicates that the warranty clerk and the cashier could reasonably expect to perform some of the work in the general accounting office with perhaps, in some cases, additional training. It is quite clear that neither the cashier nor the warranty clerk could perform any of the work in the body shop, the parts shop, or the mechanical shop, but that they could perform the duties of a gas attendant at the Texaco station. The predominant community of interest of Ms. Agnew and Ms. Rose therefore lies not with the production employees who are licenced and possess skills not possessed at all by either the warranty clerk or the cashier. Their conditions of employment are more similar to the employees of the general accounting office than the other employees and their real supervision is through the vice-president of finance and administration and not through the service managers. The cashier and the warranty clerk are not essentially engaged in performing services for the employees in the bargaining unit and their functional coherence and interdependence lies with the employees in the general accounting office. See also the decision of the Board in *Wragge Shoes Limited*, [1969] OLRB Rep. Nov. 961.

21. In *Usarco Limited*, [1967] OLRB Rep. Sept. 526, the Board set forth a series of tests in order to determine the community of interest of employees and the appropriateness of bargaining units. The four factors which were set forth in that decision are: 1) community of interest of employees; 2) centralization of managerial authority; 3) the economic factor of one bargaining unit; and 4) source of work. The factor of community of interest may be determined by considering the following criteria: a) nature of the work performed, b) conditions of employment, c) skills of employees, d) administration, e) geographic circumstances, f) functional coherence and interdependence. The parts department employees

are plant clericals, in that they service the production people and keep records. They are analogous to the stockroom clerks referred to in *Wakefield Lighting Limited*. The work of the cashier and the warranty clerk is totally an auditing and clerical job. The nature of the work performed is strictly clerical, with writing, adding and keypunching into the computer. This contrasts with the highly skilled non-clerical work performed by the persons in the mechanical shop, body shop and parts shop. The unskilled people in the bargaining unit are, for the most part, either drivers who may become workers in the parts department or the gas bar attendants in the kiosk at the Texaco service station. Most of these are part-time people who also clean out washrooms and keep track of how much gas is sold. The administration of the wonderlich test, the interview and the production index and the movement of Ms. Agnew from the Texaco service station to the job of cashier was regarded by the respondent not as a transfer but as a promotion. The Board notes that Sue Price, the accounts receivable clerk, performs a similar job to the warranty clerk and the cashier. It appears to the Board that if anyone left the employment of the respondent from the second floor, either the person working as the warranty clerk or the cashier could be offered and could do some of the jobs on the second floor.

22. Having regard to the foregoing, the Board finds that the community of interest of the warranty clerk Dianna Wilson Rose, and the cashier Debbie Agnew is far more closely aligned with the employees in the general accounting office rather than with the employees in the bargaining unit. In these circumstances, Dianna Wilson Rose and Debbie Agnew are excluded from the bargaining unit on the basis that they form part of the office staff.

23. The Registrar is directed to list this matter for continuation of hearing, including an inquiry into the origination, preparation and circulation of the statement of desire.

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**3315-84-U James Richard Hughes, Complainant, v. Amalgamated Transit Union Local #113, Respondent, v. Toronto Transit Commission, Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Whether work breaks clause included in agreement unlawfully discriminating between different crews - Whether representation duty extends to union's handling of complaint under *Employment Standards Act* - Whether putting grievances on hold pending Employment Standards ruling unlawful**

**BEFORE:** *S. A. Tacon*, Vice-Chairman.

**APPEARANCES:** *James R. Hughes* on his own behalf; *Bryan D. Hackett* and *Barry Stringer* for the respondent; *G. F. Luborsky* and *N. B. Eber* for the intervener.

**DECISION OF THE BOARD;** January 13, 1986

1. The intervener: "Toronto Transit Commission" is hereby added to the style of cause in these proceedings.

2. This is a complaint in which the complainant asserts the respondent violated the duty of fair representation imposed in section 68 of the *Labour Relations Act* by refusing to proceed to arbitration with the complainant's grievances, by signing an allegedly discriminatory collective agreement, by its conduct at a meeting on November 27, 1984, with the Employment Standards Branch and by ruling illegal the complainant's motion for a referendum.



3. Many of the events leading to this complaint are not in dispute, although the parties characterized those matters somewhat differently. Two witnesses testified: the complainant on its own behalf, and B. Allen. As well, a number of documents were filed with the Board. At the conclusion of the complainant's evidence, the respondent moved for a non-suit and elected to call no evidence. Having weighed and assessed the testimony of the witnesses and their relative credibility the Board makes the following findings of fact.

4. The complainant has approximately ten years' seniority as a driver with the Toronto Transit Commission. On June 23, 1984, he drove what is referred to as a "straight through" crew. Straight through crews are entitled to work breaks up to eleven o'clock p.m. on weekdays and eight o'clock p.m. on Saturdays, Sundays and holidays. Thereafter, those crews do not have any scheduled work breaks although "convenience stops" are arranged for drivers to obtain coffee, etc. It was not disputed that the collective agreement provided for *paid* breaks of up to thirty minutes but that breaks in excess of thirty minutes were *unpaid*. During this particular shift (from 5:15 p.m. to 2:00 a.m.), the complainant requested a one-half hour meal break; his supervisor, B. Bernardo, refused. The complainant completed the shift without a break and filed a grievance on June 26, 1984.

5. The complainant requested that W. Clearwater, a shop steward, present the grievance initially, although such matters are usually handled by the appropriate board member. At the next stage, B. Stringer, assistant business agent, informed the complainant, by letter dated June 28, 1984, that the matter did not constitute a grievance under the collective agreement but suggested that there might be a complaint under the *Employment Standards Act*. It should be noted that prior to the grievance, the complainant had earlier raised the issue of breaks on straight through crews at least with the previous union board member in the Queensway Division.

6. Following receipt of the letter, the complainant telephoned the union and spoke to J. Carruthers, executive vice-president, as Stringer was on vacation. This contact was followed up by a letter dated July 5th, in which the complainant indicated that, if the grievance did not proceed to arbitration, he would file a complaint with the Employment Standards Branch. In such event, the complainant implied there might be charges of collusion or conspiracy against the union for what, in the complainant's view, was a breach of the *Employment Standards Act* embodied in the collective agreement. A "legal brief" was enclosed for consideration by the executive board.

7. As the union and company were in negotiations at that time and straight through crews were an important subject at the bargaining table, the executive board, with the company's agreement, decided to keep the grievance timely at Step 3 pending the outcome of negotiations and of the review of the collective agreement in the context of the *Employment Standards Act*. The complainant was informed of this decision.

8. In October, however, the complainant decided to press the issue and announced, at a regular union meeting, that, as of the next board period for sign-up for routes in order of seniority (i.e., as of November 25), he intended to select a straight through crew (as a relief crew) and then take a one-half hour eating period regardless of whether one was scheduled or permitted. Stringer responded that the complainant would inevitably be dismissed if he pursued that course of action but Stringer would represent the complainant at the appeal

hearing following the discharge. At the November meeting, the complainant advised the executive board that, instead of taking the work break, he would file a grievance for each shift. The complainant did, in fact, carry out this action, filing grievances each day from November 25 to February 1985; at first, the grievances were filed singly but, later on, in groups of five or six. The complainant was informed that all grievances were processed and then kept timely at Step 3 along with the initial grievance. It should be noted that the original grievance claimed compensation from October 29, 1985. Further, the complainant conceded that at no time did he approach the union officials, including Stringer, following Stringer's letter of June 28th with respect to his grievance other than raising the matter at the union meetings. In the complainant's view, it was up to the union to contact him.

9. The complainant also decided to create some "political pressure" to achieve the result he desired. To this end, in December, he wrote concerning his grievance and his position with respect to work breaks under the *Employment Standards Act* to a number of persons including seventy-two M.P.P.'s, fourteen members of the Executive Council of Metropolitan Toronto, the Chairman of the Ontario Labour Relations Board, the Vice-President of the International Union, and the three Toronto daily papers. The complainant announced to the executive board at the December union meeting that he intended to "go over their heads" as, in his view, the executive board was not interested in proceeding with the matter. The letter he intended to send was read out at the meeting. The complainant conceded he was aware at that time that the executive board had been waiting for some period for a decision from the Employment Standards Branch as to whether the straight through crew constituted a greater benefit under the collective agreement than was provided for in the *Employment Standards Act*. Those individuals who sought further information from the TTC regarding the complainant's letters were informed that the company and the union were seeking an exemption from the *Employment Standards Act* (hereinafter referred to as the ESA), i.e., on the basis that the arrangement under the collective agreement provided a greater benefit than the ESA and that the issue of split crews was a recurring and hotly contested negotiating issue. The Vice-President of the International responded by letter of February 8, 1985 that the local was dealing with the grievance which would ultimately be placed before the general membership for decision.

10. The complainant did pursue the matter with the Employment Standards Branch (hereinafter referred to as "ESB"). On February 11, 1985, the complainant met with J. Scott (director) and G. Fenton (legislative specialist) of the ESB. Allen, W. Kellas and G. D'Eri also attended with the complainant. The complainant discussed the events to date and his position on the entitlement to breaks. According to the complainant, Scott and Fenton indicated that public transportation was not exempted from the ESA, that the ESA provided for unpaid breaks only and compensation for violations could not be retroactive for more than two years. Further, the complainant stated Scott had referred to an earlier meeting of the ESB with the union and the company and confirmed that the company and union had not requested a specific exemption from the ESA but had asked about the steps needed for such an exemption. The union and company had been informed that a legislative amendment and/or changes in the Regulations would be needed. The Board notes the meeting with the ESB was in accordance with Appendix J of the 1984 collective agreement to determine if the collective agreement violated the *Employment Standards Act*. If the ESA was held to apply, the parties had agreed that the company was released from its obligation in the collective agreement to attempt to provide straight through crews for two-thirds of its operation. Scott apparently also stated that the ESB preferred to effect settlements of complaints without resort to prosecution and



confirmed that the complainant was entitled to a break under the ESA. Scott further had indicated that the union felt the collective agreement provided a greater benefit but he opined that it did not do so. Finally, according to the complainant, Scott stated he had been informed of a vote at the Queensway Division which overwhelmingly approved the existing arrangements regarding straight through crews and that the union considered that vote representative of the entire membership. The complainant acknowledged that Wyeld, a union official, had informed the complainant that the Queensway Division had rejected any alteration in straight through crews on an experimental basis in order to ensure a scheduled meal break. The members, by vote of 259 to 8, preferred the straight through crews with no breaks. It should also be noted that the complainant had earlier written to the Ministry of Labour; the Minister had responded in writing as of January 24, 1985, that the matter of meal break requirements in the context of the collective agreement was currently under review by the ESB. The complainant actually filed a formal complaint with the ESB shortly after the February 11th meeting. To date, there has been no decision from the ESB.

11. At the regular union meeting on February 17, 1985, the complainant introduced two notices of motion, one essentially advising members working straight through crews to file grievances on each shift where work breaks were not scheduled and the other motion requiring any request for exemption from the ESA to be placed before the entire membership as a property-wide referendum. Johnson ruled both motions inadmissible in letters dated February 20, 1985. Specifically with respect to the "grievances" motion, Johnson stated that the union had attempted to negotiate paid breaks on all straight through crews in the 1984 bargaining, that the matter had been referred to the ESB and that the union was awaiting a decision from the ESB which would then be brought before the general membership. The complainant acknowledged that he knew he could have challenged the rulings that the motions were inadmissible, that a challenge was the proper manner of dealing with such rulings but that he did not do so.

12. The complainant then decided to lay charges against the union executive for acting "against the interests" of the local union. Notice was filed with the union office; the complainant also distributed about 300 copies of the charges at all TTC divisions. At the March 17th meeting, the complainant's motion to suspend the usual order of business to deal with the charges was defeated. The matter did come up under new business however. The complainant and others spoke about the charges. The complainant conceded that a complaint under section 68 of the OLRA had already been filed but could be withdrawn or set aside indefinitely if the matter was dealt with internally. A motion not to proceed further with the charges was passed by a vote of seventy-four to one. The complainant agreed that there were no violations of the duty of fair representation alleged in the conduct of that meeting on March 17, 1985.

13. The complainant also agreed that, at that meeting, Stringer read out a policy statement of the executive board giving the executive board's position that the majority of members support its straight through crews and that insistence on scheduled on all such crews would result, in the executive board's opinion, in increased use of split shifts. More generally, the complainant was aware that the issue of reduced use of split shifts had been a union goal in negotiations for approximately twenty-years. Allen testified that, in his view, the union was correct in assuming that the majority of employees did not wish unpaid breaks or split crews and supported guarantees on straight crews in the collective agreement.

14. Counsel for the union submitted that the complaint should be dismissed on several



grounds. Firstly, the complaint was premature as the grievances were still outstanding, i.e., the parties were keeping the grievances timely pending a decision by the ESB as to whether the collective agreement provided a greater benefit than the ESA. Secondly, counsel argued there was no evidence of arbitrary, discriminatory or bad faith conduct by the union in processing the grievances. Specifically, it was asserted the union had turned its mind to the grievance as the issue was already well-known to the union when Stringer responded by letter of June 28, 1984. At the March 17th meeting, the complainant was permitted to fully raise his concerns. With respect to the ESB, counsel submitted the meeting with the union, company and ESB was in accordance with the memo in the 1984 collective agreement to review the contract provisions in the context of the ESA. Counsel argued the union had not compromised the complainant's position even if the section 68 duty applied to the ESB meeting. It was contended that the union honestly believed the collective agreement provided a greater benefit and could properly seek such a ruling given the overwhelming support for straight through crews by the membership. Finally, counsel asserted the complainant was acting for improper purposes, i.e., to embarrass the union executive, rather than to enforce his rights under the ESA. In support, counsel pointed to the failure of the complainant to approach union officials to discuss his grievance outside regular union meetings, the deliberate selection of a straight through crew without scheduled breaks, the wide circulation of letters concerning his grievance to apply "political pressure" and the filing of "charges" against the union executive.

15. Counsel for the intervener asserted that the Board only had jurisdiction to deal with the section 68 complaint and not with section 22 of the ESA. It was argued that the union had put its mind to the grievance and had considered the welfare of the bargaining unit and the bargaining process in reaching its decision. Specifically, counsel submitted that, for the union to have supported the complainant's grievance, the union would have had to take a position at arbitration contrary to that taken in bargaining for many years. It was asserted that, in such event, the union would be faced with an estoppel argument but, more importantly, this would seriously undermine the union's credibility and the relationship between the parties. Counsel referred to *Toronto Transit Commission*, [1985] OLRB Rep. Feb. 344 in support.

16. It is appropriate to set out the complainant's submissions in the summary form provided to the Board. That is, the complainant argued the duty imposed under section 68 of the Act was violated in that the union did:

- (1) Act arbitrarily in advising the complainant by letter, dated 28 June 1984, over the signature of Assistant Business Agent Barry Stringer, that he did not have a grievance against the TTC under the collective agreement.
- (2) Become a party to a discriminatory Collective Agreement previous to a letter, dated 28 June 1984, over the signature of Assistant Business Agent Barry Stringer, stating the details of the letter of intent regarding work breaks negotiated with the TTC.
- (3) Act in bad faith at a meeting at the Employment Standards Branch on 27 November 1984, at which several members of the Executive Board of the union were present and misrepresented facts to the Employment Standards Branch which would prejudice any complaint that the complainant might have filed.
- (4) Act in bad faith in a letter over the signature of Charles B. Johnson, dated 20 February 1985, in which a notice of motion to permit a property-wide referendum vote to be taken was ruled illegal by the president despite the fact that the action stipulated to be considered by such referendum vote had already been taken by the Board on 27 November 1984.

With respect to item (3) the complainant asserted the misrepresentation comprised the revealing of the Queensway vote without also showing the actual ballot form to Scott and the statement

by the union that the vote was representative of the members overall. The complainant referred to the following in support: *Boise Cascade Canada Ltd.*, [1982] OLRB Rep. July 981; *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067; *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001; *Canadian Union of Public Employees Local 1000*, [1975] OLRB Rep. May 444 (the *Princesdomu* case); *United Brotherhood of Carpenters and Joiners of America and Local Union 2737*, [1980] OLRB Rep. July 1102; *Felix Charles*, [1984] OLRB Rep. July 908; definitions of arbitrary, discrimination and bad faith in *Black's Law Dictionary* (5th ed). By way of remedy, the complainant sought Board orders directing the union to:

- (a) Cease and desist any and all activities which would be unsupportive of the complainant's grievance and/or complaint at the Employment Standards Branch.
- (b) File a complaint at the Employment Standards Branch objecting to the continuing violation of Section 22 of the *Employment Standards Act* by the Toronto Transit Commission.
- (c) Resume the processing of the complainant's grievances against the Toronto Transit Commission.
- (d) Seek a settlement of the complainant's grievances through arbitration, if necessary, with the consent of the membership of Local 113.

17. In reply, counsel for the union contended that the denial of scheduled breaks for some straight through crews was not discriminatory, firstly because of the random pattern of shift assignment (subject to seniority of those signing up for the various shifts) and, secondly, because the clause was intended to obtain greater benefit for the members at large. Further, with respect to the remedy sought, counsel argued the Board had no jurisdiction to preclude the union from opposing the complainant at the ESB; indeed, the union had a duty to oppose decisions which would be detrimental to the membership. It was submitted the Board had no authority to direct the union to file a complaint under the ESA particularly where this would expose the union to charges of section 68 violations by other bargaining unit members. Forcing the union to resume processing the grievance before the ESB ruling would be counter-productive, it was argued. Finally, counsel asserted the complainant had acknowledged there was an honest difference of opinion with the union on this issue, and, hence, there was no contravention of section 68 of the Act.

18. Section 68 of the Act reads:

68. A trade union or council or trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

20. The duty imposed by section 68 of the Act has been elaborated in a number of Board decisions. It is appropriate to first refer to a passage from a leading case cited by the complainant, the *Princesdomu* decision, *supra*:

24. Bad faith and discrimination are not being alleged in the facts at hand but their meaning is well worth a brief examination. The sequential use of the words may assist in elaborating the total meaning of the duty and at the very least the particular application of each word demonstrates why this case is difficult. The prohibition against bad faith and discrimination describe conduct in a subjective sense—that an employee ought not to be the victim of the ill-will or hostility of trade union officials or of a majority of the members of

the trade union. (See Adell, *The Duty of Fair Representation - Effective Protection for Individual Rights in Collective Agreements?* (1974) 25 Indus. Rel. 602, 611.) Bad faith and discrimination constitute the outer limits of majoritarianism and official action, preventing a trade union from singling out certain individuals for unfair treatment. This aspect of the duty is particularly important in discouraging discrimination on the basis of race, creed, colour, sex, etc., preventing internal trade union politics from erupting into forms of invidious conduct; and in prohibiting extreme forms of interpersonal breakdowns within a trade union. It is basic to a system based upon an exclusive bargaining agent...

21. The Board considers it useful as well to set out the following passage from *I.T.E. Industries Limited, supra*, dealing in particular with the concept of “arbitrary” conduct and also referred to by the complainant:

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union’s conduct may be properly regarded as “arbitrary” - bearing in mind that the union’s affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union’s authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgement would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

“40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.”

Similar views were expressed in *Re: Ontario Hydro Employees’ Union - CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462 ff. in a long passage which canvassed the intended meaning of the word “arbitrary”:

“In using the word [sic] arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent’s particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word “perfunctory” and observed that a trade union, “in a non arbitrary manner [must] make decisions as to the merits of particular grievances”. It could be said that this description of the duty requires the exclusive bargaining agent to put “its mind” to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever



it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.  
...

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of [then] section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances-errors consistent with a "not caring" attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct."

19. It is clear that in order to establish a breach of [then] section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

22. Finally, given the nature of the complaint, it is important to refer to a third case cited by the respondent, *Felix Charles, supra*, at paragraph 27:

27. In bargaining changes that affect the competing interests of employees a union has a two stage involvement: firstly it must be the forum for resolving the conflict between sometimes irreconcilable employee interests; secondly it must act as the spokesman for the interests that carry the day. Once the internal choice is made the union must approach the employer with the force and conviction of a body with a single voice. To review the union in this later stage as the antagonist of the minority is to misconceive the process. Professor Cox, in discussing the processing of grievances, usefully summarized this dimension of union activity as follows:

When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. Limits must be placed on the authority of the group, but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter. A large part of the daily grist of union business is resolving differences among employees poorly camouflaged as disputes with the employer.

(Cox, "Rights Under a Labour Agreement", (1956) 69 Harv. L. Rev. 601 at 626-27.)

23. The Board first deals with the assertion the collective agreement is discriminatory within the meaning of section 68 of the Act by not providing for scheduled work breaks for some straight through crews. As noted in the *Princesdomu* decision, *supra*, discrimination, in the context of the duty of fair representation, focuses on the singling out of an individual or groups for unfair treatment, particularly when the basis for identification of the individual or

group is a criterion such as race, creed, colour, sex, etc. The provision in question does not single out individuals or groups according to such improper criteria. Drivers “sign-up” for various routes during the board periods and are allocated routes accordingly, subject to the seniority articles in the collective agreement. The provision does differentiate between some straight through crews and others. But such differentiation is characteristic of collective agreements which routinely provide for matters such as, shift premium, overtime rates, job classification and corresponding wage rates, etc. Section 68 is not intended to preclude those categories of differentiation. Thus, the Board concludes that the allegation on this aspect of the complaint fails.

24. The Board next turns to the issue of “timeliness”, that is, whether the complaint is premature as the union has not decided whether to proceed to arbitration. Section 68 complaints are generally brought in the context of a *refusal* to proceed to arbitration. Further, the Board will not usually deal with a section 68 complaint while the grievance is proceeding through the normal internal grievance stages. However, a union may not seek to avoid a section 68 complaint by “freezing” grievances at the internal stages pre-arbitration. On the facts, the initial grievance was filed in June 1984 and later grievances filed daily from the end of November 1984, to February 1985. It is not disputed that the grievances have been kept timely in the grievance process (and the complainant was aware of this) pending the decision from the ESB. However, given the considerable delay involved in finally deciding whether the grievances should be referred to arbitration, the Board considers that the handling of the grievances to date, including the decision of the union to keep the grievance timely, should be examined in the context of the duty imposed by section 68 of the Act. The Board also notes, though, that a review at this stage would not preclude a further section 68 complaint based on subsequent conduct by the union in dealing with the grievances, such as, a decision not to proceed to arbitration following a ruling from the ESB.

25. In the Board’s view, the reply by Stringer stating that there was no basis in the collective agreement for the grievance cannot be viewed as arbitrary. The promptness of the reply is not indicative of a failure of Stringer to “turn his mind” to the grievance. Rather, the issue of work breaks on straight through crews in the context of the ESA had been of great concern to the parties in their recent negotiations. Indeed, the parties had agreed to review this issue with the ESB on the basis that the collective agreement provided a greater benefit than the ESA. Thus, Stringer properly stated the union’s considered position that the grievance would not succeed. That Stringer was not aware that the complainant was driving that route as a relief crew is irrelevant to the issue raised by the grievance.

26. Nor does the Board regard the union’s conduct at the meeting with the ESB as a violation of section 68 of the Act. Firstly, the Board notes that the evidence concerning this meeting was hearsay. The Board is, for the purposes of this complaint, prepared to assume to be true the complainant’s reports of this meeting. On this basis, the Board finds the union presented its position at the ESB meeting that the collective agreement constituted a greater benefit than the ESA and, hence, straight through crews without scheduled breaks did not contravene the ESA. The Board rejects the complainant’s assertion that section 68 required the union to support his complaint before the ESB. Firstly, the duty of fair representation applies only to a trade union within the context of the bargaining relationship with the employer: *Raphael A. Julien*, [1985] OLRB Rep. Apr. 537; *Angelo Moro*, [1983] OLRB Rep. Aug. 1354; *Ronald Lewzonivk*, [1984] OLRB Rep. Jan. 48; *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Cameron Douglas Wonch*, [1984] OLRB Rep. Nov. 1659. It is not at all clear

that the duty would extend to the ESB meetings. Beyond this, though, as noted in the passage quoted in *Felix Charles, supra*, the union is entitled to “act as spokesman for the interests that carry the day”. With respect to the straight through crews, there is little doubt that the majority strongly preferred straight through crews without scheduled breaks to split crews. Guarantees of increased use of straight through crews were a high priority in negotiations for many years. Moreover, if the ESB ruled that all straight through crews must have breaks, the collective agreement provided that the employer was released from its obligation to ensure as far as practicable that two-thirds of the crews be straight through. That is, the number of split crews would inevitably be increased. In the meeting with the ESB, the union was supporting a policy consistently favoured by the membership. The Board does not regard such a stance as contrary to the duty of fair representation owed the complainant. The union was under no obligation to present the actual ballot to the ESB officials when referring to the vote at the Queensway Division; there was no misrepresentation of the issue voted on. Nor was there an obligation to conduct a property-wide referendum before the union could assert that the Queensway vote was representative, given the long bargaining history on this issue. Thus, the Board rejects the complainant’s allegations with respect to the union’s dealings with the ESB.

27. The ruling of the motions proposed by the complainant as illegal does not contravene the section 68 duty either. The reasons for the ruling were given in writing by Johnson and, on their face, related to the motions. There was no evidence on which to infer the rulings were for reasons other than those stated. Further, the complainant did not challenge the rulings in accordance with the usual procedure for doing so, although the complainant acknowledged he was familiar with those procedures.

28. The complainant did not assert that the union’s conduct at the March 17th meeting violated the duty of fair representation. That meeting, however, is useful in evaluating the union’s conduct toward the complainant overall. The complainant tabled serious charges against the executive. Nonetheless, the executive permitted open discussion of the motion; the complainant was not prevented from expressing his views. As noted, the motion not to proceed with the charges was overwhelmingly carried.

29. The Board next reviews the union’s decision to keep the grievances timely pending the ESB ruling. That decision was a practical and reasonable response to the serious issue facing the parties, namely, whether the collective agreement contravened the ESA. If the ESB ruled the collective agreement did not constitute a greater benefit than the ESA, the parties would have to evaluate their positions in the context, not just of the grievances, but of the provision releasing the company from the limitations on the proportion of split crews. To have proceeded to arbitration before that ruling would have required the union to repudiate its long-standing bargaining position with negative consequences for the parties’ bargaining relationship. The grievances were kept timely on agreement and, thus, the complainant was not prejudiced by the delay. The Board, then, concludes that this aspect of the complainant’s allegations fails as well.

30. Counsel for the union asserted the complainant was acting throughout from improper motives, specifically, a desire to embarrass the executive rather than pursue a legitimate complaint. There is no doubt the complainant was intent on making an issue out of the lack of scheduled breaks on some straight through crews. To give but two examples, the complainant deliberately signed up for those crews (and even announced that decision at a regular union meeting) and the complainant widely circulated his “grievance” to a variety of



persons (including MPP's, etc.) to generate "political pressure" (in the complainant's words). The Board need not finally determine the motivation behind the complainant's conduct. What the Board must assess is whether the union has contravened its duty of fair representation. And, for the foregoing reasons, the Board has concluded that there has been no such violation.

31. Accordingly, the complaint is hereby dismissed.

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**1792-85-U Ken Johnson**, Complainant, v. Ontario Secondary School Teachers' Federation, Respondent

**Duty of Fair Representation - School Boards and Teachers Collective Negotiations Act - Labour Relations Act not applicable to teachers - Unfair representation complaint by teacher dismissed without hearing**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *J. Wilson* and *H. Kobryn*.

**DECISION OF THE BOARD;** January 10, 1986

1. This is a complaint under section 89 of the *Labour Relations Act* which alleges that the respondent has violated sections 65, 68 and 69 of the Act. Section 65 prohibits a trade union from participating in or interfering with the formation or administration of an employer's organization. Section 68 requires that a trade union represent employees in good faith. Section 69 requires that a trade union act in good faith in referring persons to employment.

2. The information set forth in the complaint is not very detailed. However, it appears that the complainant is a teacher employed by the East York Board of Education, and the instant complaint against the Ontario Secondary School Teachers' Federation arises out of and relates to his employment with the School Board.

3. The employment relations of teachers are governed primarily by the *School Boards and Teachers Collective Negotiations Act*, and not the *Labour Relations Act*. This point is made clear by section 2(f) of the *Labour Relations Act* which provides as follows:

2. This Act does not apply,

(f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

Nothing in the *School Boards and Teachers Collective Negotiations Act* appears to give the Board jurisdiction to deal with the matters dealt with by sections 65, 68 and 69 of the *Labour Relations Act*. Accordingly, it appears that this Board has no jurisdiction to deal with the subject matter of the instant complaint.

4. Section 71 of the Board's Rules of Procedure provides as follows:

71.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

- (a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;
- (b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or
- (c) confirm its decision dismissing the application or complaint.

5. In that the Board appears to lack jurisdiction to deal with this matter, the Board is of the view that the complaint does not make out a *prima facie* case for the remedy requested. Accordingly, pursuant to section 71 of the Board's Rules of Procedure, the complaint is hereby dismissed.

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**3428-84-R; 3429-84-U** United Steelworkers of America, Applicant, v. K & U Manufacturing Limited, Respondent, v. Group of Employees, Objectors; United Steelworkers of America, Complainant, v. **K & U Manufacturing Limited**, Respondent

Discharge for Union Activity - Employee - Interference in Trade Unions - Remedies - Unfair Labour Practice - Lay-off of union supporters and promotion of union opponents motivated by anti-union reasons - Captive audience meeting unlawful - Board considering probability of lay-off for business reasons in computing compensation - Directing posting and mailing of employee notice and permission for union to conduct employee meeting during work hours - Whether working foremen managerial or confidential

**BEFORE:** *Robert D. Howe*, Vice-Chairman, and Board Members *I. M. Stamp* and *S. O'Flynn*.

**APPEARANCES:** *David Nicholson* and *Brando Paris* for the complainant/applicant; *Robert A. McDermid* and *Ivan Kazakow* for the respondent; no one appearing for the objectors.

**DECISION OF THE BOARD;** January 20, 1986

1. File No. 3428-84-R is an application for certification. File No. 3429-84-U is a complaint under section 89 of the *Labour Relations Act* in which the complainant (also referred to in this decision as the "Union") alleges that the respondent (also referred to in this decision as the "Company") has contravened sections 3, 64, 66(a), 66(c), and 70 of the Act. In addition to the various remedies it is seeking under section 89 of the Act, the Union seeks to be certified under section 8 of the Act on the basis of those alleged contraventions of the Act, in the event that it has insufficient membership support to be certified without a representation vote pursuant to section 7.

2. These matters were initially scheduled to be heard on April 26, 1985. On that day the parties met with a Board Officer to review the issues raised by the proceedings. In a decision dated April 29, 1985 in respect of File No. 3428-84-R, the Board, differently constituted, wrote as follows:

1. Prior to the hearing in this matter, the parties met with a Labour Relations Officer to review the issues raised by this application.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties the Board finds that all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In view of the representations made to the Officer, the Board hereby appoints a Labour Relations Officer to inquire into the list of employees and composition of the bargaining unit and report back to the Board.



5. This matter is referred to the Registrar to be re-listed for hearing on May 10 and May 31, 1985, together with the proceeding in Board File No. 3429-84-U.

6. This panel of the Board is not seized with this matter.

3. Pursuant to that appointment, Board Officer A. Smith met with the parties on May 16 and reviewed the respondent's records pertaining to E. Restaini, B. Simon, K. Singh, and K. Tomislav, whose inclusion on Schedule "A" of the list of employees filed by the respondent was challenged by the applicant. After reviewing those records, the Officer advised the parties that his record check indicated that all of the challenged persons should remain on Schedule "A". That finding has not been disputed by the applicant.

4. A meeting with the Board Officer initially scheduled for May 23, 1985 was rescheduled to June 6, 1985 on the agreement of the parties. After affording the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence, the Board Officer prepared a written report dated July 17, 1985, which contains examinations of Rudy Koller and James Alfred Mungra. After receiving copies of that Report, the representatives of the parties each forwarded written submissions to the Board concerning the conclusions which they respectively contended the Board should reach on the basis of the Report. Neither party requested that a hearing be held in respect of the matters covered by the Report. Accordingly, the Board will dispose of those matters on the basis of the Report and those written submissions, in accordance with section 67(4) of the Board's Rules of Procedure.

5. The applicant contends that Messrs. Koller and Mungra should be excluded from the bargaining unit on the grounds that they exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act.

6. Over the years the Board has developed a number of guidelines to assist it in determining whether an individual exercises managerial functions within the meaning of section 1(3)(b) of the Act. See, for example, *The Royal Ontario Museum*, [1985] OLRB Rep. Feb. 325; *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199; *Vagden Mills*, [1982] OLRB Rep. June 968; *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38, and *Chrysler Canada Ltd.*, [1976] OLRB Rep. Aug. 396. In making determinations under section 1(3)(b), the Board has consistently recognized that effective collective bargaining requires an "arm's length" relationship between employees and persons who exercise managerial functions. In recognition of the divergence between the objectives, priorities, and interests of those groups, section 1(3)(b) serves to exclude from the scope of "employee" (for purposes of the Act) persons whose inclusion in the bargaining unit would place them in a position of conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as union members or members of the bargaining unit.

7. There is also a well established body of Board case law concerning the meaning of the phrase "employed in a confidential capacity in matters relating to labour relations." See, for example, *Airline (Malton) Credit Union Limited*, [1981] OLRB Rep. Nov. 1521, and the numerous decisions referred to therein.

8. Having regard to the provisions of section 1(3)(b) of the Act, and the principles set

forth in the aforementioned jurisprudence, the Board has come to the conclusions set forth below, after carefully reviewing the Report and the written submissions of the parties.

9. Mr. Koller was hired by the respondent in December of 1984 as a welder/fitter. He became a working foreman in March of 1985. In that position he spends approximately 80% of his time doing physical work of the type which he performed prior to his promotion. He also assigns work to the welders and fitters employed by the respondent, and checks their time cards to ensure that they are filled out properly. He does not hire, discharge, discipline, layoff, demote, or promote employees, nor does he make effective recommendations concerning such matters. He has no power to require or authorize employees to work overtime, nor does he have any involvement in setting their wages or benefits. He had not granted time off to any employee prior to March 22, 1985 (the date on which the Union's certification application was filed with the Board). In accepting the position of working foreman, Mr. Koller made it clear to Ivan Kazakow, the President and owner of the respondent, that he did not want to get involved in any "labour problems" or "personal matters" concerning employees, and that he was only prepared to be "a working foreman responsible for the job".

10. Having regard to all of the evidence, we find no support whatsoever for the applicant's contention that Mr. Koller exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

11. Although Mr. Mungra falls somewhat closer to the line, we have concluded, on balance, that he too is properly included in the bargaining unit. His only involvement in hiring consisted of telling Mr. Kazakow that a lathe operator whom he knew was looking for a part-time job. Upon receiving that information, Mr. Kazakow authorized Mr. Mungra to tell the individual that he could work for the Company on a part-time basis. This limited involvement in the hiring of a single person who, as a part-time employee, would not be included in the bargaining unit, is not indicative of an effective power of recommendation in the sense described in the Board's jurisprudence. It is unclear from Mr. Mungra's examination whether or not he was told at the time he accepted the position of working foreman that he had the power to discipline employees. When the Officer initially asked him if Mr. Kazakow had told him whether he had the authority to issue any discipline to anybody, Mr. Mungra stated (at page 27, line 16 of the Report), "No, nothing of that nature was mentioned to me." Later in his examination, the Officer said to him, "I think you said to me that you don't have any authority to issue any discipline to an employee. Was that correct?" Mr. Mungra's reply (at page 31, line 24) was "I think it was mentioned to me that I'm in a position to issue discipline." In any event, it is clear from the evidence that Mr. Mungra has never in fact disciplined any employee. His only involvement in layoffs consisted of a discussion with Mr. Kazakow about a shortage of work, during which Mr. Kazakow, after reviewing the work that remained to be done, concluded that "Alex" (the standard drill operator) would have to be laid off. That isolated instance also falls far short of indicating an effective power of recommendation. As noted by Union counsel in his written submissions, Mr. Mungra ordered some supplies and arranged for two workers to come in half an hour early for a week while Mr. Kazakow was on a three-week vacation. However, the supplies merely consisted of "cutting tools and a jack and some other small tools". Moreover, the temporary substitution of 7:30 a.m. for the normal 8:00 a.m. starting time was done with the consent of the workers involved. Mr. Mungra did not direct them to report at that time, and did not incur any overtime or other expenses for the Company by arranging for that temporary change.

12. Mr. Mungra spends at least two-thirds of his time performing physical work. While

he also has some supervisory functions analogous to those generally performed by a lead hand, we have concluded on the totality of the evidence that Mr. Mungra does not have effective control over the employment relationship of any of his fellow employees, and does not exercise any other powers that would place him in a position of conflict of interest if he was included in the bargaining unit. We have also concluded that he is not employed in a confidential capacity in matters relating to labour relations, as there is no evidence that he has a regular, material involvement in matters relating to labour relations.

13. For the foregoing reasons, the Union's challenge to the inclusion of Messrs. Koller and Mungra in the bargaining unit is hereby dismissed.

14. The hearing of the merits of the Union's complaint under section 89 of the Act and application for certification under section 8 commenced on May 10, 1985, and continued on July 23 and September 20, 1985. During those three days of hearing, the Board heard oral evidence from six witnesses and also received a total of 53 exhibits. The findings of fact contained in this decision are based upon our assessment of the totality of that evidence and the inferences which may reasonably be drawn in the circumstances of this case. In resolving conflicts in the evidence, we have had regard to such factors as the consistency of the evidence given by the various witnesses, the firmness of their respective memories, our perception of their ability to resist the influence of self interest in giving their evidence, their capacity to express their recollections clearly, and their demeanour while testifying.

15. The Company's business consists of designing and manufacturing steel mill equipment, and providing various machining and fabricating services. The events which gave rise to these proceedings occurred in March of 1985. At that time the Company was working on two major projects for Dravo Wellman Corporation ("Dravo"), which is a company located in Pittsburgh, Pennsylvania. Dravo manufactures various types of machinery for generating stations. One of the respondent's projects for Dravo consisted of the fabrication of a rotary car dumper. The purchase order for that job was received in February of 1984. The respondent's work on that project was completed on March 8, 1985, and the final shipment of the rotary car dumper was made that day.

16. The Company's other project for Dravo involved the fabrication of a stacker/reclaimer. The purchase order in respect of that project was received by the respondent in the summer of 1984. It was Mr. Kazakow's evidence that by March 8, 1985, less than a third of that project remained to be completed. However, that evidence was contradicted by George Legierski, who was the respondent's plant supervisor at that time. Mr. Legierski, who is one of the grievors in these proceedings, testified that the project was only forty or fifty per cent complete at that time. We prefer the evidence of Mr. Legierski concerning that matter, and all other matters on which there is conflict between the testimony of Mr. Kazakow and Mr. Legierski, as we found Mr. Legierski to be a more candid and reliable witness than Mr. Kazakow.

17. The respondent had also received from Dravo a contract for certain further work relating to the stacker/reclaimer project, but that work was temporarily stopped in March due to a design problem.

18. In an attempt to obtain further work for the Company, Mr. Kazakow provided Dravo with a quotation for another rotary car dumper on February 15, 1985. Dravo viewed that



quotation favourably and indicated that the respondent would be given the work as soon as Dravo received the order from its Vancouver customer. To comply with that customer's requirements, Dravo had specified that if the respondent wished to obtain the work, it would have to hire a quality control welding inspector (in addition to the welding supervisor and the services of the welding engineer that the respondent was required to have in order to maintain its certification by the Canadian Welding Bureau). To meet that requirement, the respondent ran a newspaper advertisement, which was answered by Manny Macedo, another of the grievors in these proceedings. After submitting his resume, Mr. Macedo commenced employment with the respondent on February 25, 1985.

19. Mr. Kazakow had also been in contact with American Demag ("Demag"), another company located in Pittsburgh, in an attempt to obtain a job involving a substantial project for Stelco. Having been advised by Demag that the respondent had a good chance of obtaining that order, Mr. Kazakow flew to Pittsburgh on March 11, 1985, to speak with officials of Dravo and Demag.

20. When he went to Dravo, Mr. Kazakow was informed that the respondent had lost the rotary car dumper job on which it had bid on February 15, 1985. The reason given to Mr. Kazakow was that Dravo's contract contained a \$1,000 a day penalty clause, and Dravo was of the view that the respondent was too small to be relied upon in such circumstances. Mr. Kazakow then went to Demag, where he was told that Demag had not yet obtained the aforementioned Stelco job since Stelco's decision about whether or not to proceed with that order had been delayed for six months.

21. On March 12, 1985, while Mr. Kazakow was in Pittsburgh, Messrs. Macedo and Legierski had a discussion about their dissatisfaction with their conditions of employment. One of Mr. Legierski's main concerns was the fact that he was working between fifty-five and ninety hours per week without receiving any overtime pay. The mechanism used by the respondent to achieve that result was to "subcontract" work to a company that had been registered by Mr. Legierski at the suggestion of Mr. Kazakow. Thus, Mr. Legierski received an amount equal to straight time pay through that company for hours which he worked in excess of forty-four per week. Although that arrangement might be of interest to the Employment Standards Branch of the Ministry of Labour, its legality is not in issue in these proceedings. Its relevance in the present case is limited to a matter of credibility. In this regard, it provides a further instance in which we are satisfied that Mr. Kazakow, who testified that he did not suggest to Mr. Legierski the idea of using such a company, was attempting to mislead the Board.

22. During that discussion about their dissatisfaction with their conditions of employment, Mr. Macedo suggested to Mr. Legierski that a union be contacted. In order to do so discreetly, Mr. Macedo left the respondent's premises and telephoned a representative of the Union from the shop next door. Following that conversation, Mr. Macedo returned to the respondent's premises and spoke with many of the respondent's employees about getting together after work to have a beer and talk about the Union. With respect to the credibility of Mr. Macedo as a witness, we note that although he denied having spoken to any employees about the Union in the office adjacent to the plant, we are satisfied from the evidence of Ghulam M. Butt that Mr. Macedo did speak to Mr. Butt about the Union in that office. Mr. Butt, who was employed by the respondent as a welder at all material times, was called by the respondent as a reply witness. We found him to be a candid and credible witness whose

testimony was more reliable than that of Mr. Macedo, who was prone to exaggerate and embellish while giving his evidence.

23. Mr. Legierski also approached a number of the respondent's employees that day about getting together after work to have a beer and to talk about the Union. As a result of further telephone calls by Mr. Macedo, arrangements were made for employees to meet with a Union representative at 7:00 o'clock that evening. Just before leaving for that meeting, Messrs. Macedo and Legierski approached Rudy Koller, who at that time was employed by the respondent as a welder/fitter. When Mr. Macedo asked him if he would like to join them for a beer, Mr. Koller became very angry and said, "So you have the nerve to invite me also for a beer. You want me to sign a union card also. That's the kind of people we need. Can't put a decent eight-hour working day in.... We don't need you. Get out. We don't need a union." In testifying about that conversation, Mr. Macedo told the Board that Mr. Koller told him that Mr. Kazakow already knew what was going on, and also told him (Mr. Macedo) that he would be the first one to be fired the next day when he walked in. In his forthright testimony before the Board, Mr. Koller firmly denied the accuracy of Mr. Macedo's version of that exchange, which version was also not supported by Mr. Legierski, whose only recollection of the conversation was that Mr. Koller "screamed to [Mr. Macedo], 'it's union talk' or something like that." On balance, we prefer the evidence of Mr. Koller over that of Mr. Macedo, whom (as noted above) we did not find to be a completely reliable witness.

24. At the meeting with the Union representative that night, membership cards were signed by eleven persons, including ten of the employees whose names appear on the list of employees filed by the respondent in respect of these proceedings. Among those persons who signed Union cards at that two and a half hour meeting were the grievors Manny Macedo, Chagen Patel, Salim Schmordok, and Ted Prychodzen. Although Mr. Legierski was instrumental in arranging for a number of those employees to attend that meeting, it appears that he did not himself sign a Union card.

25. Mr. Kazakow's return flight from Pittsburgh on March 12 was delayed by bad weather. It was his evidence that he decided while he was on the plane that he would have to layoff some of the respondent's employees immediately, and that unless the Company somehow got some more orders he would have to lay off further employees later on in order to keep the Company out of bankruptcy. When his flight finally landed in Toronto at 6:45 p.m., he was met at the airport by his wife Christina, who was at all material times employed by the Company as a secretary-receptionist. The respondent called Mrs. Kazakow as a reply witness in these proceedings. We found her to be a credible witness, and we accept her evidence that although she was at work in the front office (which is not the aforementioned office in which Mr. Macedo spoke to Mr. Butt about the Union), she was unaware that Messrs. Macedo, Legierski, or any of the other employees, were discussing unionization.

26. After going home for dinner, Mr. Kazakow went to his office where, according to his evidence, he decided that the first employees to be laid off would be Mr. Legierski and Mr. Macedo, because they were his "overhead". In explaining that decision to the Board, Mr. Kazakow described Mr. Legierski as being akin to a manager who looked after the operation in his absence, and did drawings and acted as superintendent of the shop while Mr. Kazakow was there. Mr. Legierski was referred to in various parts of the evidence as a "manager", "plant superintendent", "foreman", and "supervisor". While the evidence indicates that he performed some supervisory functions similar to those performed by



Messrs. Mungra and Koller after his layoff, it does not establish that Mr. Legierski performed managerial functions within the meaning of section 1(3)(b). Moreover, counsel for the respondent did not contend that Mr. Legierski was not an “employee” entitled to the protections afforded by the *Labour Relations Act*, or that if he was not an “employee”, the Union could not seek a remedy incidentally beneficial to him by virtue of the detrimental effect which his layoff may have had on the Union’s organizational activities. (See, generally, *AAS Telecommunications*, [1976] OLRB Rep. Dec. 751.) Although Mr. Legierski’s employment application (Exhibit #6) clearly indicated that he had prior experience as a welder/fitter, it was Mr. Kazakow’s evidence that he gave no consideration to keeping him on to perform that type of work.

27. Mr. Kazakow testified that he had hired Mr. Macedo as a full-time quality control welding supervisor at the insistence of Dravo. However, he stated that he could no longer afford to have this “overhead”, and noted that Dravo could not dictate to him any more as the respondent had lost the rotary car dumper job which Dravo had earlier indicated would be awarded to it. He further testified that he did not intend to recall Mr. Macedo because Mr. Macedo had been late for work fifty per cent of the time during the two weeks that he worked for the Company.

28. Mr. Kazakow further testified that he decided on the evening of March 12 to lay off on the following morning Salim Schmordok, who had been hired as a lathe operator on March 6, 1985, but had been temporarily used on various other jobs when he proved unable to operate the lathe satisfactorily. He had also proved to be very poor at welding.

29. The fourth person selected by Mr. Kazakow to be laid off on March 13 was Chhagen Patel, a welder who had commenced employment with the Company on November 16, 1984. Mr. Kazakow, who described Mr. Patel as a “good welder” and an “excellent man”, told the Board that it was not easy to decide which of the Company’s three welders should be laid off. However, it was his evidence that he decided upon Mr. Patel because welder Lombardi Giuseppe and fitter Elie Eskander formed a very good team which he did not want to disturb, and because Mr. Butt not only welded for the Company but also drove the Company truck. Mr. Patel was unable or unwilling to drive that truck because it had a standard transmission.

30. Mr. Kazakow arrived at work at about 7:00 o’clock the next morning (March 13). When Mr. Legierski arrived approximately half an hour later, Mr. Kazakow asked him to come to his office. Since we found Mr. Legierski to be a more truthful and reliable witness than Mr. Kazakow, we accept Mr. Legierski’s evidence concerning that encounter where it differs from that of Mr. Kazakow. Accordingly, we accept Mr. Legierski’s evidence that when he went to Mr. Kazakow’s office Mr. Kazakow asked him, “What happened here yesterday?” When Mr. Legierski replied, “Nothing, we were working and everything was fine”, Mr. Kazakow said, “I got a phone call that something was happening here.” He also told Mr. Legierski, “You should call me first.” When respondent’s counsel suggested to Mr. Legierski in cross-examination that Mr. Kazakow was just asking him how the work had gone while he was away, Mr. Legierski replied, “I don’t think so. He said he got some phone call. He mentioned [Alfred] Mungra. He told me that I should call him first.” Mr. Legierski further testified (during cross-examination), “It was like he [Mr. Kazakow] knew what happened in the shop. He asked me what I knew and I was supposed to tell him what was happening there the day before.” Mr. Kazakow also told Mr. Legierski, “I have bad news for you. Because I didn’t get the contract it means no more job for you here.” Upon receiving that information,



Mr. Legierski said that he was prepared to quit his employment with the Company as he already had been promised a job by another employer. That job was to commence on March 20, 1985.

31. After speaking with Mr. Legierski, Mr. Kazakow called Mr. Macedo to his office and told him that he was “overhead” that was no longer needed due to a shortage of work. He also told him that he had never before had a full-time quality control welding inspector, and had only hired him to fill that position at the insistence of Dravo, which had subsequently declined to award the Company the rotary car dumper contract for the Vancouver customer. No mention was made during that meeting of the activities which had occurred in the respondent’s plant on the previous day. After telling him that he would pay him until noon that day, Mr. Kazakow accompanied Mr. Macedo to the plant and stood nearby as he said goodbye to his fellow workers before leaving the plant.

32. Mr. Kazakow next spoke with Mr. Schmordok who, as noted above, had only been employed by the Company since March 6. Mr. Kazakow told Mr. Schmordok that he was laying him off because he did not have a job for him. Mr. Kazakow also told him that he would not recall him because he was not qualified. Mr. Kazakow then spoke to Mr. Patel. After explaining that he had been unsuccessful in getting further work while in Pittsburgh, Mr. Kazakow told Mr. Patel that it was necessary for the Company to lay him off due to a shortage of work, but that he would be recalled as soon as things picked up.

33. In addition to its full-time work force, the respondent employed several persons on a part-time basis. Those persons, who each had jobs with other employers, worked for the respondent in the evening whenever their services were needed. Some of them provided their services as “subcontractors”, under arrangements similar to that described above in relation to Mr. Legierski. Although Mr. Kazakow initially told the Board that none of those persons worked after the start of March, further cross-examination by Union counsel with the assistance of the Company’s records concerning the hours worked by such persons revealed that following the layoff of the grievors, several of those part-time employees continued to perform work for the Company, some of which could have been performed by Mr. Legierski, Mr. Macedo, or Mr. Patel.

34. After speaking with Messrs. Legierski, Macedo, Schmordak, and Patel on March 13 to advise them of their layoff, Mr. Kazakow spoke with Mr. Mungra to advise him that he intended to promote him to the position of working foreman in charge of machining. He also spoke with Mr. Koller to advise him that he wished to promote him to the position of working foreman in charge of fabricating. Messrs. Mungra and Koller each agreed to accept those positions.

35. Mr. Kazakow held a meeting with the Company’s employees at approximately 10:30 that morning. He was accompanied at that meeting by another member of management, who was not called as a witness in these proceedings. Mr. Kazakow told the Board that the purpose of that meeting was to inform employees of the changes that he had made as a result of the shortage of work. At the meeting, employees were informed of the four layoffs and were also told that there might be further layoffs unless the Company obtained more work. It was also announced at that meeting that Messrs. Mungra and Koller had become working foremen in charge of machining and fabricating respectively. Mr. Kazakow told the employees that if the Company could start to make a profit, there would be a bonus for employees as there had

been three years earlier. He also said, "We'd better work more friendly. If anyone has a problem, they'd better come to me." In his evidence in chief, he told the Board that he did not say anything else at that meeting. However, in cross-examination he acknowledged that he told employees that they were not to work more than forty-four hours per week unless he specifically requested them to do so, "because the Company could not afford to pay overtime."

36. During his cross-examination by counsel for the Union, Mr. Kazakow adamantly denied that anything was said about coffee breaks at that meeting. When asked if he had said that the Company had fifteen-minute coffee breaks while a lot of other places only had ten-minute coffee breaks, Mr. Kazakow stated that they had talked about that many times before, but not at that meeting. He added that he was "300% sure it was not at that meeting". However, that evidence was contradicted by the evidence of Gulam Butt who, as noted above, was called as a reply witness by the respondent. During cross-examination, Mr. Butt testified that management mentioned at that meeting that the respondent gave its employees fifteen-minute coffee breaks, while many other employers only gave their employees ten-minute coffee breaks. In resolving the conflict between the testimony of Mr. Kazakow and the testimony of Mr. Butt, we prefer the evidence of Mr. Butt, who impressed us as being a more impartial and credible witness than Mr. Kazakow.

37. It was Mr. Kazakow's evidence that at the time of that meeting he had no knowledge of any union activities. He testified that he did not find out about them until approximately 12:30 p.m. on March 14 when Mr. Patel told him that while he was in Pittsburgh on March 12, Mr. Macedo had called aside each of the employees one by one during working hours to talk about the Union.

38. On Friday March 15, Mr. Kazakow decided that it would be necessary to temporarily layoff fitter/welder Ted Przychodzen on the following Monday. Mr. Przychodzen had been working on the aforementioned contract from Dravo on which work had been stopped as a result of a design problem. After the design problem had been resolved, Mr. Kazakow attempted to recall Mr. Przychodzen on May 1, but was told by Mr. Przychodzen's wife that he was already working somewhere else.

39. The particulars set forth in Appendix "C" to the Union's section 89 complaint include an allegation that on or about March 14, 1985, Mr. Kazakow informed Mr. Przychodzen that he could no longer work more than forty-four hours per week for the respondent unless he could arrange to work any hours in excess of forty-four as a subcontractor. However, Mr. Kazakow denied ever having discussed anything like that with Mr. Przychodzen, and Mr. Przychodzen was not called to contradict that evidence. Thus, as recognized by Union counsel in his submissions to the Board, that allegation is not supported by the evidence adduced before the Board in these proceedings.

40. Mr. Kazakow went away on vacation on March 28 and did not return until April 18. After he returned, the remainder of the respondent's aforementioned stacker/reclaimer project was shipped out. Since there was no work left for them to do, Mr. Kazakow laid off welder/fitter Lombardi Giuseppe and boring mill operator Alexander Basevich on April 22, 1985.

41. The Union filed its application for certification with the Board on March 22, 1985. The Registrar sent notice of that application, together with the other documents which customarily accompany such notice, to the respondent on April 4, 1985. On April 11, 1985,

after being advised that the Form 6 Notice to Employees of Application for Certification and of Hearing had not been posted due to the absence of the owner, the Board (differently constituted) authorized a Board Officer to enter the respondent's premises to post that notice. After returning from vacation, Mr. Kazakow opened the envelope from the Board containing the aforementioned documents and returned a telephone call from Board Officer Angus Smith, who had been authorized by the Board to enquire into the Union's section 89 complaint (in File No. 3429-84-U) and to endeavour to effect a settlement, pursuant to section 89(2) of the Act.

42. During re-examination on July 23, 1984, Mr. Kazakow told the Board that as of that time only three people remained at work, as the Company had only one small job which was itself almost completed. He further testified that he had put the respondent's building up for sale and hoped to move to smaller premises. He indicated that no one knew if and when the Stelco job would come through, and expressed concern that the bank might close his Company down.

43. The layoff of Messrs. Legierski, Macedo, Schmordok, and Patel on March 13, and Mr. Przychodzen on March 18, 1985, forms the major thrust of the Union's complaint under section 89 of the Act. As noted above, it is alleged that in laying off those individuals, the respondent contravened several provisions of the *Labour Relations Act*, including sections 64, 66(a), 66(c), and 70, which provide as follows:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

It is well-established in the Board's jurisprudence that a discharge or layoff will constitute an unfair labour practice if it is motivated in whole or in part by anti-union considerations. See, for example, *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, in which the Board wrote, in part, as follows (at paragraph 4):



.... Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive....

(See also *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449; *Starplex Scientific Division of Canadian Medical Laboratories Limited*, [1981] OLRB Rep. March 346; *Knud Simonsen Industries Limited*, [1980] OLRB Rep. Oct. 1466; *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645.); and *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027).

44. Having carefully considered all of the evidence and the submissions of the parties, we have concluded that the respondent, through Mr. Kazakow, was motivated at least in part by anti-union considerations in respect of the layoff of Messrs. Legierski, Macedo, Schmordok, and Patel on March 13, 1985. Although Mr. Kazakow testified that he did not become aware of any Union activities until March 14, we do not find that testimony to be credible. Having regard to all of the circumstances, we are satisfied on balance that Mr. Kazakow became aware sometime on March 12 that his employees were being encouraged by Messrs. Macedo and Legierski to consider unionization. As noted above, when he met with Mr. Legierski shortly after 7:30 a.m. on March 13, Mr. Kazakow stated that he had been told in a telephone call on the previous day that "something was happening", and rebuked Mr. Legierski for not calling him first. Another indication of management's awareness of union activities was their reference at the aforementioned employee meeting to the fact that the Company's coffee breaks were five minutes longer than the ten-minute coffee breaks given by many other employers. Under the circumstances, including Mr. Kazakow's attempt to mislead the Board by telling us that he was "300% sure" that coffee breaks were not discussed at that meeting, it is reasonable to infer that the matter of coffee breaks was raised by management at that meeting in an attempt to persuade employees that some of their existing working conditions were more favourable than those enjoyed by some other employees and that, accordingly, a union was not needed. Mr. Kazakow's admonition to employees to "work friendly", and his warning that "[i]f anyone has a problem they'd better come to me", are also indicative of his awareness that his employees were moving toward unionization. His concern about the possibility of collective employee action is also betrayed by the fact that he told employees that they were not to work more than forty-four hours per week unless he specifically requested them to do so, "because the Company could not afford to pay overtime." Since the Company had not been in the practice of paying overtime for hours worked in excess of forty-four, there would have been no need for Mr. Kazakow to make that statement unless he was of the view that something had happened, or was about to happen, that would make it likely that the Company's failure to pay overtime would be called into question.

45. Further support for the Union's contention that the layoffs were at least partially motivated by anti-union considerations is provided by the fact that the persons selected for layoff included Messrs. Legierski and Macedo, who were the two employees who decided that the Union should be contacted, and who spoke with other employees on March 12 to invite them to get together after working hours that day to have a beer and talk about the Union. Moreover, those layoffs, the promotion of two employees opposed to the Union, and the aforementioned meeting with employees, alloccurred the very next day after many of the respondent's employees met with a Union representative and joined the Union. As noted above, although Mr. Legierski's employment application clearly indicated that he had prior experience as a welder/fitter, it was Mr. Kazakow's evidence that he gave no consideration to keeping him on to perform that type of work. His failure to even consider that as a possible way of

keeping Mr. Legierski as an employee until such time as the Company obtained further orders provides a further indication that Mr. Kazakow was intent on ridding the Company of Mr. Legierski as a result of his union activities on the previous day.

46. In concluding that the respondent contravened the Act in respect of those layoffs, we have also taken into account our finding that Mr. Kazakow, the sole witness called by the respondent concerning its motivation for those layoffs, was not a reliable witness. As noted above, we have found that he attempted to mislead the Board concerning a number of matters, including the amount of work that remained to be done on the stacker/reclaimer as of March 8, 1985, the contents of his discussion with Mr. Legierski on March 13, 1985, the subject matters that were discussed at management's meeting with employees that day, the amount of work performed by part-time employees and "subcontractors" following the March 13 layoffs, and the time at which he first became aware of his employees' union activities.

47. For the foregoing reasons, we find that the respondent contravened sections 64 and 66 of the Act by laying off Messrs. Legierski, Macedo, Schmordok, and Patel on March 13, 1985. We are also satisfied that the "captive audience" meeting held that day involved a further contravention of section 64 of the Act, and also a contravention of section 70. Although an employer is free to express his views within the limits described in section 64 (see, generally, *Vogue Brazziere Incorporated*, [1983] OLRB Rep. Oct. 1737), he cannot use coercion, intimidation, threats, promises, or undue influence, as management did at that meeting by announcing the aforementioned unlawful layoffs, advising employees that two employees opposed to the Union had been promoted, promising the employees that there would be bonuses if the Company made a profit, and stating, "We'd better work more friendly. If anyone has a problem, they'd better come to see me." While some of those statements might not involve a contravention of section 64 in another context, in the circumstances of the present case we are satisfied that they constituted thinly veiled threats that employees would be penalized if they supported unionization, and promises that they would be rewarded if they did not.

48. Although the matter is not entirely free of doubt, we have concluded, on balance, that the respondent did not contravene the Act in laying off Mr. Przychodzen on March 18, 1985. Neither Mr. Przychodzen nor anyone else was called by the Union to contradict the respondent's evidence that Mr. Przychodzen was temporarily laid off at that time as a result of a work stoppage caused by a design problem in respect of the Dravo contract on which he had been working. Moreover, as noted above, it was Mr. Kazakow's uncontradicted evidence that he attempted to recall Mr. Przychodzen on May 1, after the design problem was resolved, but was told by Mr. Przychodzen's wife that he was already working somewhere else. In reaching this conclusion, we have also taken into account the fact that there is no evidence that Mr. Przychodzen engaged in any union activities that would differentiate him from any of the respondent's many other employees who joined the Union. In this regard, there is no evidence that he played a leadership role such as that played by Messrs. Macedo and Legierski, nor was his layoff effected precipitately and made to coincide with the layoff of those two persons, as were the layoffs of Messrs. Schmordok and Patel.

49. We are similarly satisfied that the respondent's layoff of Lombardi Gieuseppe and Alexander Basevitch on April 22, 1985 did not contravene the Act. As indicated above, the remainder of the stacker/reclaimer project had been shipped out by that time, and we are satisfied on the totality of the evidence that the sole reason for their layoff was that, for business reasons beyond the control of the respondent, there was no work left for them to do.



50. The remedy in respect of the aforementioned unfair labour practices must be tailored to fit the somewhat unique circumstances of this case. Although we have concluded that it was the union activities in which the employees engaged on March 12 that precipitated the four layoffs which occurred on the following day, we are satisfied on the totality of the evidence that the loss of the rotary car dumper job and the non-availability of the Demag project for Stelco would have resulted in some layoffs later that month and in April in any event. (It was not alleged that the employees' union organizational activities prompted the respondent to reject orders or to otherwise avoid obtaining new work, and the evidence adduced in this case would not support such a finding. See, generally, *Academy of Medicine*, [1977] OLRB Rep. Dec. 783.) In view of his dissatisfaction with his employment by the respondent, we are satisfied on the balance of probabilities that Mr. Legierski would have resigned from that employment by March 19, 1985 and gone to work for the other employer who had promised him a job beginning March 20, 1985. Accordingly, the compensation payable to Mr. Legierski will be limited to the period from March 13, 1985 to March 19, 1985 inclusive. We are further satisfied that Messrs. Macedo and Patel would have been laid off by the respondent by April 22, 1985 at the latest, when the stacker/reclaimer was shipped out. We also find that Mr. Schmordok would have been permanently laid off by March 31, 1985 at the latest, due to his unsatisfactory work performance. Thus, the compensation to be paid to them must reflect those circumstances. In view of our finding that Mr. Legierski would have resigned from the employ of the respondent by March 19, 1985, and our finding that Mr. Schmordok would have been permanently laid off by March 31, 1985, the Board's reinstatement order will be limited to Messrs. Macedo and Patel, and will become operative as soon as the respondent has work to perform which they are respectively qualified to perform.

51. Where the Board finds that a party has committed an unfair labour practice, it will generally direct that party to post a notice in conspicuous places in the work place, to attempt to remedy the adverse psychological impact of the contravention of the Act. See, for example, *Holiday Juice Ltd.*, *supra*, and *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. In view of the large number of layoffs which have occurred, we also find it appropriate to supplement our usual "posting" order with a "mailing" order, to ensure that all bargaining unit employees will receive notice of the Board's decision in this matter. (See, generally, *Wilco- Canada Inc.*, [1983] OLRB Rep. June 989.) To offset the effect of the aforementioned "captive audience" meeting, the Board will also order that the Union be permitted to convene a one-hour meeting of all employees in the bargaining unit on the respondent's premises during working hours, in the absence of management.

52. For the foregoing reasons, we are satisfied that but for the respondent's unfair labour practices Messrs. Macedo, Schmordok, and Patel would in all probability have been actively employed by the respondent on March 22, 1985 when the Union filed its certification application. However, Mr. Legierski would not, as he would likely by that time have resigned his employment with the respondent to take up employment with the other employer who had promised him a job beginning March 20, 1985. Mr. Przychodzen would also have been absent from work that day on indefinite layoff, and would not have been offered recall until May 1, 1985. Thus, neither Mr. Legierski nor Mr. Przychodzen should be included as employees for the purposes of determining the "count" under section 7 of the Act. However, Messrs. Macedo, Schmordok, and Patel must be included in the number of employees in the bargaining unit at the time the application was made, for to exclude them would be to permit the respondent to benefit from its action of laying them off on March 13, 1985, in contravention of the Act.



53. Having regard to all of the evidence, we find that there were sixteen employees in the bargaining unit at the time the Union made its certification application, and that nine of them were members of the applicant on April 16, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Thus, we are satisfied that more than fifty-five per cent of the employees in the bargaining unit at the time the application was made, were members of the applicant at the pertinent time.

54. We are further satisfied that there are no circumstances in the present case that would make it appropriate to direct that a representation vote be taken. Indeed, the respondent's aforementioned unfair labour practices have created a situation in which the true wishes of the employees would be unlikely to be ascertained by a representation vote, for as frequently noted by the Board in its jurisprudence, a discharge or indefinite layoff is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a union as their bargaining agent. (See, for example, *Elbertson Industries Limited*, [1984] OLRB Rep. Nov. 1564, and *DI-AL Construction Limited*, [1983] OLRB Rep. March 356). In the instant case, the respondent's action of laying off Messrs. Macedo and Legierski, the two employees who originated the Union's organizational activities, together with two other employees who had joined the Union on the previous evening, while at the same time promoting two employees who were opposed to the Union, would have made abundantly clear to employees the depth of the respondent's opposition to the Union, and would likely have created concerns among them that if they were to support, or to continue to support the Union, they might jeopardize their own continued employment. Moreover, as indicated above, those layoffs and promotions were announced by management at a "captive audience" meeting at which management promised that there would be bonuses if the Company started to make a profit, and told employees that they had better "work more friendly" and come to management if they had a problem.

55. A certificate will issue to the applicant for the following bargaining unit, pursuant to section 7(3) of the Act:

all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

56. Since the applicant is entitled to certification under section 7 of the Act, it is unnecessary to deal with its application for certification under section 8.

57. For the reasons set forth above, the Board hereby declares that the respondent has contravened sections 64, 66, and 70 of the *Labour Relations Act* and, pursuant to section 89 of the Act, hereby orders that the respondent:

- (1) cease and desist from contravening sections 64, 66, and 70 of the *Labour Relations Act*;
- (2) reinstate Manny Macedo and Chhagan Patel as soon as the respondent has work to perform which they are respectively qualified to perform;

- (3) compensate Manny Macedo, Chhagan Patel, George Legierski, and Salim Schmordok for all lost wages and benefits sustained by them through the respondent's violation of the Act;
- (4) permit the Union access to its plant during working hours for the purpose of convening a meeting for a maximum of one hour to address bargaining unit employees out of the presence of any member of management;
- (5) post copies of the attached notice, marked "Appendix", after being duly signed by its President, in conspicuous places in its plant, where they are likely to come to the attention of employees, and keep the notices posted for sixty consecutive working days; reasonable steps shall be taken by the respondent to ensure that the notices are not altered, defaced, or covered by any other material; reasonable physical access to the premises shall be given by the respondent to a representative of the Union so that the Union can satisfy itself that this posting requirement is being complied with; and
- (6) at its own expense, mail a copy of this decision, and of the attached notice marked "Appendix", after being duly signed by its President, to the residence of each bargaining unit employee employed by it at any time during the period from March 13, 1985 to the date of this decision, and forthwith provide the Union with a list of the names and addresses of all of the employees to whom that material has been sent pursuant to this order.

58. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

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## Appendix

### The Labour Relations Act

# NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A SERIES OF HEARINGS ARISING OUT OF THE EFFORTS OF THE UNITED STEELWORKERS OF AMERICA TO BECOME THE COLLECTIVE BARGAINING AGENT FOR OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY LAYING OFF MANNY MACEDO, GEORGE LEGIERSKI, SALIM SCHMORDOK, AND CHHAGEN PATEL ON MARCH 13, 1985, AND BY HOLDING A "CAPTIVE AUDIENCE" MEETING WITH OUR EMPLOYEES ON THAT DAY. THE BOARD HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING TO INTERFERE WITH THESE RIGHTS;

WE WILL REINSTATE MANNY MACEDO AND CHHAGEN PATEL AS SOON AS WE HAVE WORK TO PERFORM WHICH THEY ARE RESPECTIVELY QUALIFIED TO PERFORM;

WE WILL COMPENSATE MANNY MACEDO, CHHAGEN PATEL, GEORGE LEGIERSKI, AND SALIM SCHMORDOK FOR ALL LOST WAGES AND BENEFITS SUSTAINED BY THEM THROUGH OUR VIOLATION OF THE ACT.

WE WILL PROVIDE THE UNION WITH ACCESS TO OUR PLANT DURING WORKING HOURS FOR THE PURPOSE OF CONVENING A MEETING FOR A MAXIMUM OF ONE HOUR TO ADDRESS BARGAINING UNIT EMPLOYEES OUT OF THE PRESENCE OF ANY MEMBER OF MANAGEMENT;

WE WILL MAIL AT OUR OWN EXPENSE A COPY OF THE BOARD'S DECISION AND THIS NOTICE TO THE RESIDENCE OF EACH BARGAINING UNIT EMPLOYEE EMPLOYED BY US AT ANY TIME DURING THE PERIOD BETWEEN MARCH 13, 1985 AND THE DATE OF THE BOARD'S DECISION, AND WILL PROVIDE THE UNION WITH A LIST OF THE NAMES AND ADDRESSES OF ALL OF THE EMPLOYEES TO WHOM THAT MATERIAL HAS BEEN SENT.

K & U MANUFACTURING LIMITED

PER: \_\_\_\_\_  
PRESIDENT

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.



**2991-84-R** Graphic Communications International Union, Local 517, Applicant, v. **McCollum Graphics Incorporated**, o/a Baxter Press, Hunter Printing London Limited and Baxter Graphix Inc., Respondents

**Related Employer - Unprofitable printing shop closed down - Whether newly incorporated entities common employers - Board looking beyond legal ownership to find common control or direction - Absence of employees in unit not reason to refuse declaration**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

**APPEARANCES:** *Geoffrey A. Beasley* and *Ron Berman* for the applicant; *Jonathan McKinnon* and *James Baxter* for the respondents.

**DECISION OF THE BOARD;** January 13, 1986

1. This is an application under section 1(4) of the *Labour Relations Act*.

2. Section 1(4) provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

3. The application as filed named as respondents McCollum Graphics Incorporated, o/a Baxter Press, and Hunter Printing London Limited. An intervention was filed by Baxter Graphix Inc. At the commencement of the hearing into this matter, counsel for the applicant requested that Baxter Graphix Inc. be added as a party respondent. Counsel appearing on behalf of Baxter Graphix Inc. and the other two firms agreed that this would be appropriate. Accordingly, the style of cause of this application is amended to show Baxter Graphix Inc. as a respondent.

4. Most of the evidence in this matter was given by Mr. James Baxter, the owner of Baxter Graphix Inc. In the course of giving his evidence, Mr. Baxter referred to a number of his relatives. For ease of reference, members of the Baxter family will be referred to in this decision in terms of their relationship to Mr. James Baxter.

5. Hunter Printing London Limited ("Hunter Printing") commenced operations in the City of London in or about 1950 under the control of a Mr. Hunter. Following Mr. Hunter's death in the 1960s, his estate sold the company. Following the sale, control of the company passed to members of the Baxter family. On or about November 13, 1970, almost all of the shares of Hunter Printing became the property of Kincaldrum Estates. The shares of Kincaldrum Estates were held by James Baxter's grandfather, (also named James), his grandmother, and his father Ian Baxter.

6. James Baxter testified that Hunter Printing started as a one-colour letter press shop

and acquired a reputation as a “black and white shop” capable of performing inexpensive quality work. In the early 1970s Hunter Printing began to produce the racing program for the Western Fair racetrack. In order to perform this work more effectively, in 1974 Hunter Press purchased some expensive equipment that was particularly adapted to medium and long runs in two colours. The equipment could also be utilized for four colour runs and “book work” material. At about this time, Hunter Printing had approximately 20 employees operating some \$100,000 worth of equipment. In 1976, however, Hunter Printing lost the Western Fair work and began to run into financial difficulties. Attempts were made to acquire other work which would permit the company to continue to make efficient use of its expensive equipment, but without success.

7. In 1976, at about the same time as Hunter Printing began to experience financial difficulties, James Baxter joined the company. He had just graduated from the University of Western Ontario with a degree in History and had no prior experience working in the printing industry. Mr. Baxter began working in sales and customer relations but over time also acquired experience in the printing end of the operation. In April of 1977 James Baxter’s grandmother died. Although this point was not specifically referred to in evidence, it appears reasonable to infer that she was predeceased by her husband. Under his grandmother’s will, James Baxter became a 25 per cent owner of Kincaldrum Estates. Under the same will, James Baxter’s two sisters also became part owners of Kincaldrum Estates. At no point did the sisters, one of whom lives in Richmond Hill and the other in King City, play an active role in the running of Hunter Printing.

8. Indications are that during most of the 1970’s the actual day to day operations of Hunter Printing were managed by James Baxter’s father, who was the company’s president. James Baxter testified that his father had a full-time residence in King city but travelled to London on a regular basis to manage the affairs of the company. However, in 1979 his father ceased to travel to London on a regular basis, in consequence of which James Baxter became more active in the running of Hunter Printing. He assumed the title of general manager. James Baxter testified that by 1981 he was effectively in control of Hunter Printing, notwithstanding this his father continued to hold the title of President. At that point in time, the company had only six employees.

9. As indicated above, Hunter Printing faced economic difficulties commencing in 1976 with the loss of the Western Fair racing program. Much of the company’s difficulties were due to its inability to acquire high-volume work suitable to its relatively expensive equipment. In addition, Hunter Printing had high overhead costs, caused in part by the fact that the mortgage and operating costs of the building it owned amounted to about \$3,000 per month. In order to cut costs, the company reduced its work force and sold off certain equipment. As already noted, by 1981 the company had only six employees. This was reduced by James Baxter to four employees by the end of the year. In 1982 Hunter Printing sold off approximately \$102,000 worth of equipment. The decision to sell the equipment was made by James Baxter. Notwithstanding the scaling down of the size of the company’s work force, Hunter Printing was still unable to make money. The firm’s problems were compounded by the economic recession in the early 1980s during which a number of customers did not pay their bills. In 1982 Hunter Printing lost approximately \$270,000. In 1983 its losses rose to approximately \$323,000. In an attempt to keep the company afloat, in 1983 both James Baxter and his father ceased to draw a wage from the company. James Baxter took a second job as a security guard. In addition, James Baxter and his wife made some direct loans to the company.

10. As already noted, the costs associated with operating its building were a financial drain on Hunter Printing. The building had about 8,800 square feet of space, which was more than required for the company's scaled-down operations. In October of 1983, some of the space was leased out to another firm. Additional space was leased out in February of 1984, bringing the area actually occupied by Hunter Printing down to 5,800 square feet. This was apparently still in excess of the company's requirements. The building was put up for sale, and a potential purchaser found. It was arranged that title to the building would pass on July 27, 1984. However, the potential purchaser failed to close. James Baxter testified that had the building been sold, he would have changed the name of the business and continued operations from new and smaller facilities. However, with the failure of the sale, James Baxter decided that Hunter Printing was no longer a viable entity, and that it would be best for him to get a fresh start.

11. As indicated above, by the end of 1981 Hunter Printing was down to four employees. These employees worked primarily on the printing of envelopes, letterheads and flyers, although they also performed some larger jobs, most notably the printing of a large order of books. In contemplation of the proposed sale of the building, the employees were laid off on July 11, 1984. Hunter Printing actually continued operations until August 31, 1984. Between these two dates, the work was either performed by James Baxter himself, or he contracted it out to other firms.

12. On March 31, 1981 McCollum Graphics Incorporated was incorporated. McCollum is James Baxter's middle name. The directors of the company were James Baxter, his wife (who was also the firm's president) and a family friend who took no part in the operation of the business. McCollum Graphics initially operated out of its own premises at a separate location in London. There is very little evidence before us concerning the first year of McCollum Graphics' operations. However, it appears that under the direction of James Baxter, it provided graphic services to Hunter Printing, and perhaps to other firms as well. About one year after McCollum Graphics commenced operations, it moved to the Hunter Printing building. It did not pay any rent to Hunter Printing. In January 1984 McCollum Graphics purchased approximately \$9,900 worth of equipment from Hunter Printing. This equipment included some office equipment, an A. B. Dick Press, a Heidelberg Platen Press, and some other assorted printing equipment. It appears that James Baxter made the decisions with respect to the sale on behalf of both Hunter Printing and McCollum Graphics. James Baxter testified that he decided upon the purchase price for the equipment based upon discussions with second-hand equipment dealers. Proceeds from the sale were used by Hunter Printing to repay at least part of the loans which James Baxter and his wife had made to the company. The equipment purchased by McCollum Graphics was not moved out of the Hunter Printing building. To the contrary, it continued to be operated by the employees of Hunter Printing for approximately seven months prior to their being laid off. It should be noted, that after the sale of this equipment, Hunter Printing continued to own approximately \$25,000 worth of other equipment.

13. In consequence of the decision made by himself not to continue Hunter Printing, on or about October 1, 1984 James Baxter commenced to operate a printing business utilizing the corporate entity McCollum Graphics Incorporated. At this point, he operated McCollum Graphics under the name of Baxter Press. On or about October 26, 1984 this printing operation was taken over by a newly incorporated firm, Baxter Graphix Inc. (originally,



Mr. Baxter had wanted to continue utilizing the name Baxter Printing, but it was not available to be used by an incorporated company). James Baxter is the sole owner and director of Baxter Graphix Inc. Baxter Graphix operates out of a new facility with approximately 1,200 square feet of space. The cost of operating this space is approximately \$800 per month. The company uses the equipment which McCollum Graphics purchased from Hunter Printing. Title to this equipment remains with McCollum Graphics. Baxter Graphix also makes use of between \$7,000 and \$8,000 worth of equipment purchased elsewhere. The equipment owned by Hunter Printing which was not purchased by McCollum, was sold by Hunter Printing to an outside buyer. The Hunter Printing building was eventually taken over by Canada Trust pursuant to the terms of a mortgage it held on the property.

14. At the time of the hearing into this matter, Baxter Graphix had three staff members. Among them were James Baxter who did most of the printing work. The only other full-time staff member was a woman who looked after the running of the office. She had previously performed the same duties for Hunter Printing. The third staff member was a woman who James Baxter described as a "go-fer". She made deliveries, did packing work and picked up film. Originally, Baxter Graphix started with a fourth person, a printer who had worked for Hunter Printing. He worked for Baxter Graphix on a part-time basis until early May 1985 when he quit because of health problems.

15. James Baxter testified that the work performed by Baxter Graphix includes the printing of letterheads, business cards and flyers in one or two colours. According to Mr. Baxter, he seeks work from people such as doctors and lawyers since their work generally involves fairly short runs, and a rapid turnaround time. Indeed, he testified that he does not take on any work which he cannot turn out within three days. The company keeps a small inventory of items such as paper. Most supplies are purchased as and when required.

16. Baxter Graphix has some of the same customers that James Baxter dealt with at Hunter Printing. It also has some new customers. Mr. Baxter testified that he makes a point of not dealing with any customers that were slow in paying their accounts to Hunter Printing.

17. The applicant trade union dates its interest in Hunter Press back to June of 1983. Following negotiations in which the company was represented by James Baxter, Hunter Printing and the Graphic Arts International Union, Local 517 entered into a collective agreement which was to run until July 15, 1984. At the time the collective agreement was entered into, Hunter Printing was down to four employees and had its building up for sale. On May 17, 1984 Graphic Communications International Union, Local 517 (the applicant in these proceedings) served notice to bargain on Hunter Printing for a new collective agreement and proposed certain amendments to the provisions of the existing agreement. It is the contention of the applicant, not disputed by the respondents, that Graphic Communications International Union, Local 517, is a successor trade union to Graphic Arts International Union Local 517. Hunter Printing did not respond to the notice to bargain. By way of this application, the applicant seeks a finding that the three respondents should be treated as a single employer, and that its bargaining rights with respect to employees of Hunter Printing continue with respect to the employees of Baxter Graphix.

18. The purpose of section 1(4) of the Act was discussed as follows in the *Brant Erecting and Hoisting* case, [1980] OLRB Rep. July 945 at p. 948:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out

by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights.

19. Section 1(4) does not require that related business activities that are under common control or direction be carried on simultaneously or contemporaneously. This point was made clear by the 1975 addition to section 1(4) of the phrase “whether or not simultaneously”. In the *Brant Erecting and Hoisting* case, the Board commented on the addition, as follows:

... The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a “transfer of a business” which might trigger the application of section 55.

20. Section 1(4) indicates that it applies only to “associated or related activities or businesses”. In that *Hunter Printing, Baxter Graphix and McCollum Graphics* when operating as *Baxter Press* were all printing shops, serving the London area market, we are satisfied that they were carrying on associated or related activities or businesses.

21. In order to apply section 1(4), the Board must be of the opinion that two or more entities which carry on associated or related activities or businesses are under common control or direction. Common control or direction over two corporate entities is generally demonstrated by showing that the corporations have common shareholders and officers. However, the Board has in a number of cases held that two corporations can be under common direction even though legally owned by different individuals. The Board reached such a conclusion in *Evans-Kennedy Construction Ltd.*, [1979] OLRB Rep. May 388 where a Mr. Kennedy operated a company owned by himself while at the same time directing the affairs of a second company owned by a lady with whom he had a close personal relationship. A similar conclusion was reached in *J. D. S. Investments Ltd.*, [1981] OLRB Rep. Mar. 294. In that case a project nominally being constructed by a small development company was in fact built under the direction of an official of a much larger construction company who utilized the know-how and resources of the larger company. The owners of the two companies were friends, and, in their personal capacities, joint owners of the project under construction. While in these and certain other cases, the Board has indicated that it will look beyond mere ownership to ascertain who, in fact, directs or controls activities that give rise to employment, it has also indicated that the type of control involved must involve a real ability to “call the shots”, as opposed to acting under the direction of more senior officials within the organization. This point was expressed in *Jen-Ry Utility Contracting Company Limited*, [1984] OLRB Rep. Dec. 1724, as follows:

16. All of these cases make it clear that the test for “control” under section 1(4) of this Act envisions the ultimate power to “call the shots” where necessary, as counsel for



the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a "related employer" for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example, say "yes" or "no" to a wage proposal from the union for both entities.

22. James Baxter testified that by 1981 he was effectively in control of Hunter Printing. Although only part owner (through Kincaldrum Estates) of Hunter Printing, two of the other owners, namely his sisters, never played a role in its operation. His father, who was also a part owner, ceased to play an active role in the company's affairs once he ceased travelling to London from his home in King City on a regular basis. In his role as the company's general manager, James Baxter made decisions relating to the laying off of employees and selling equipment as a way of coping with the firm's financial difficulties. It was he who negotiated a collective agreement on behalf of Hunter Printing with the trade union. It is particularly noteworthy that he negotiated this agreement some seven years after Hunter Printing had lost the work for the Western Fair and after the company had cut its work force to four employees. It is also noteworthy that it was James Baxter who made the decision to have Hunter Printing cease operations. When it ceased operations Hunter Printing was performing work similar in most respects to that which was subsequently performed by Baxter Graphix.

23. It will be recalled that it had been James Baxter's intent to move Hunter Printing to a new building and change its name to Baxter Press. James Baxter did not, however, move Hunter Printing and change its name. He did move to new facilities but rather than changing the name of Hunter Printing he commenced operations utilizing McCollum Graphics Incorporated which he operated under the name of Baxter Press. Later he utilized a newly incorporated firm, Baxter Graphix Inc. Both of these firms primarily used equipment formerly owned by Hunter Printing. Much of Hunter Printing's equipment was sold elsewhere, but this equipment was not required for a scaled-down printing operation. It is clear that Hunter Printing, McCollum Graphics operating as Baxter Press and Baxter Graphix all conducted their operations under the direction of James Baxter. Given these considerations, we are satisfied that all three firms were being carried on under common direction.

24. The respondents contend that it would be inappropriate to bind Baxter Graphix to the applicant's bargaining rights with respect to Hunter Printing in that the companies were involved in totally different operations both in terms of scale and type of product. The evidence, however, indicates that at the time it ceased operations, Hunter Printing was performing generally the same type of work that is now being performed by Baxter Graphix. Further, the predecessor to the applicant trade union acquired its bargaining rights with respect to Hunter Printing at a time when it was under the direction of James Baxter and long after the company had scaled down its operations. Given these considerations, we believe it appropriate to continue the union's bargaining rights by treating the three respondents as a single employer. In reaching this decision, we have rejected the respondents' contentions that the Board should exercise its discretion not to make a declaration under section 1(4) because there are currently no employees in the bargaining unit. The respondents contend that should Baxter Graphix hire any printing employees in the future, the union could at that time apply to be certified to represent them. Quite apart from our general concerns that such an approach might encourage employers to purposefully leave bargaining units "empty" pending the outcome of section 1(4) proceedings, it is our view that the absence of employees in the



bargaining unit should not defeat the instant application. If Hunter Printing had continued to operate without any employees in the bargaining unit, the bargaining rights of the applicant trade union would have continued, although these rights would have had little meaning unless and until either former employees were recalled to work or new employees hired. Given the facts of this case, in our view it is appropriate that the applicant be put in the same position with respect to Baxter Graphix.

25. Having regard to the foregoing, the Board, pursuant to the provisions of section 1(4) of the *Labour Relations Act*, will treat McCollum Graphics Incorporated, o/a Baxter Press, Hunter Printing London Limited and Baxter Graphix Inc., as constituting one employer for the purposes of the Act. The Board further declares that Graphic Communications International Union, Local 517, is the current bargaining agent for employees of Baxter Graphix Inc.

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**0298-84-R; 1698-84-M** United Brotherhood of Carpenters and Joiners of America, Local 93, Applicant, v. Construction P.H. Grager Inc., Respondent, v. Labourers' International Union of North America, Local 527, Intervener; Labourers' International Union of North America, Local 527, Applicant, v. **Pierre A. Gratton Construction Inc.** and/or Construction P.H. Grager Inc., Respondent, v. United Brotherhood of Carpenters and Joiners of America, Local 93, Intervener

**Certification - Construction Industry - Employee - Carpenters' Union making timely application for certification - Employer not aware that sale provision binding him to Labourers' collective agreement - Whether persons hired contrary to Labourers' agreement "employees" for purposes of Carpenters application - April Waterproofing principle considered**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *B. L. Armstrong*.

**DECISION OF THE BOARD;** January 27, 1986

1. This matter includes an application for certification which was filed on April 27, 1984, with respect to employees of the respondent Construction P.H. Grager Inc. No other interested parties were indicated on the application, and the Board, differently constituted, followed its usual practice in the construction industry of certifying the applicant without a hearing. The Board's decision, however, prompted the following letter from the applicant to the Board:

Dear Sir:

Re: United Brotherhood of Carpenters and Joiners of America, Local 93, and Construction P.H. Grager Inc. O.L.R.B. File No. 0298-84-R

On April 27, 1984 the Carpenters, Local 93 applied for certification for the above mentioned Employer and requested to be certified for all Carpenters and Carpenters apprentices on I.C.I. construction and for *all employees* for other sectors of the construction industry in

Board area 15. On May 16, 1984 the Board issued two certificate, one for I.C.I. construction and the other for other sectors of the construction industry in the Board area 15, both covering only carpenters and carpenter apprentices.

We believe the Board omitted to consider the request of the Applicant for all employees unit for sectors other than the I.C.I. sector of the construction industry.

Due to the above and due to any argument to the contrary we respectfully request reconsideration or an amendment to the certificate for non-I.C.I. construction.

Kind regards.

Yours truly,

"F. Manoni"

Frank Manoni  
General Organizer

As well, on May 28, 1984, the intervener Labourers' International Union of North America, Local 527, wrote to the Board through counsel and indicated that it had learned of the certification, and that it already held bargaining rights for both carpenters and labourers engaged in formwork for "Grager", by virtue of a collective agreement that it had with a *related* or *predecessor* company, the respondent Pierre A. Gratton Construction Inc. The intervener accordingly requested the Board to reconsider its decision of May 16, 1984 certifying the applicant, and to revoke the certificates issued.

2. The Board conducted its inquiry into the application of sections 1(4) and 63 to the two companies in question, and, by decision dated February 28, 1985, found that, although there had been no design on the part of the respondents' principals to avoid the collective bargaining obligations of Pierre A. Gratton Construction Inc., in law a "sale" had taken place within the meaning of section 63 of the Act. That decision meant that the Carpenters' application was, either in whole or in part, a displacement application with respect to the bargaining rights held by the Labourers' for Construction P. H. Grager Inc.

3. As it happened, the present application for certification was timely, having been filed in the "open period" of the Labourers' collective agreement. And as the arguments of the parties had contemplated, the Board, in view of the "sale" finding, directed that a representation vote be held between the Carpenters' and the Labourers' Union, and directed the parties to meet with a labour relations officer in the hope that a voting constituency and voters' list could quickly be worked out. No such resolution, however, was forthcoming.

4. The Board is advised that there are no longer any employees working for "Grager" in the province of Ontario, and the Board therefore is not presently in a position to conduct a representation vote in this matter in any event. Looking ahead to the possibility of "Grager" obtaining work in Ontario in the future, however, the Board must turn its mind to two issues germane to any possible vote. The first is whether the voting constituency ought to embrace other than 'carpenters' and 'carpenters' apprentices', and the second, more fundamental, is whether the respondent employer can be found to have employed any "employees", as that term is used in section 7(1) of the *Labour Relations Act*, on the date that the Carpenters' Union filed its application.

5. Dealing with the second issue first, the Labourers' argue that none of the carpenters

and labourers working for “Grager” on the date of this application were hired through the hiring hall provisions of the Labourers’ collective agreement, and accordingly are not “employees” for the purposes of section 7(1) and the Board’s *April Waterproofing* line of cases.

6. As the Board set out in its finding-of-a-“sale” decision of February 28, 1985, Mr. Gratton, the guiding hand of “Grager”, was unaware that the collective agreement for Pierre A. Gratton Construction Inc. was applicable to the business that he had entered into jointly with Mr. Gervais and Mr. Vandel, and there is no issue in this case that the employees of “Grager” were not hired in accordance with the Labourers’ collective agreement. In *April Waterproofing*, [1980] OLRB Rep. Nov. 1577, the Board wrote:

7. The displacement of one union’s bargaining rights by another is by no means rare in the construction industry. Such cases generally involve situations where the applicant union has won over the allegiance of members of the incumbent union who were hired by the employer in accordance with the provisions of the incumbent’s collective agreement. The instant case, however, involves an entirely different situation. Here, the respondent did not hire the three individuals in dispute through the intervening union as required by the terms of the relevant collective agreement, but rather, it hired them “off the street”. The applicant in turn seeks to displace the intervener’s bargaining rights on the basis of the fact that two of the individuals so hired are its supporters.

8. There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen’s Association v. Maritime Employer’s Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, *an employee must have been hired in accordance with the provisions of the agreement*. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

(emphasis added)

The Board had a similar fact situation before it in *Cooper Construction Company Limited*, [1982] OLRB Rep. Aug. 1152. The Board wrote:

14. The Board considers the circumstances in the *April Waterproofing* decision to be quite analogous to those in the instant application and, therefore, having found that Angelo Lovalente was at work in the bargaining unit on the date of the application contrary to the provisions of the collective agreement to which the intervener and respondent are bound, the Board further finds that he was not an employee in the bargaining unit for purposes of section 7(1) of the *Labour Relations Act*.

7. In two more recent decisions, however, the Board was faced with circumstances in which it found it inappropriate to apply the *April Waterproofing* kind of reasoning. The first, *Culliton Brothers Limited*, [1983] OLRB Rep. March 339, involved a contractor located in Stratford who, owing to a job it was performing in Cornwall, had the Sheet Metal Workers’ Union become certified for its employees in the Cornwall area. Subsequent to that, the Legislature passed amendments to the *Labour Relations Act* which had the effect of bringing



all of Culliton Brothers' employees under the scope of the union's *province-wide* collective agreement. This result for the company was the subject of a decision by the Board, as was the obligation of the company's already existing employees to then join the union. In between those two Board decisions, some of these existing (non-union) employees of the company applied for termination of the union's bargaining rights. The Board wrote:

20. The union places primary reliance upon the decision of the Board in *April Waterproofing* (cited *supra*). There, the Board had before it a "displacement" certification application, where the support for the raiding union came from two employees who had been recently hired "off the street" contrary to the terms of the incumbent union's collective agreement. That collective agreement required that all new employees should be members of the incumbent union hired through the incumbent union's hiring hall. In *April Waterproofing*, however, the company had breached this contractual obligation, and, in so doing, had acquired two employees who were adherents of a rival union. The hiring of these two employees was improper from its very inception, yet they purportedly provided the basis for the raiding union's attack upon the incumbent union's bargaining rights.

The Board went on to note:

21. This approach was subsequently adopted in *Cooper Construction*, *supra*. It must be noted it does not require advertent misconduct on the part of the employer. Although in *April Waterproofing* it was alleged that the employer had intentionally hired the two employees to foster a raid, the Board did not hear evidence on, or determine, that issue. *April Waterproofing* stands for the proposition that employees illegally hired contrary to the terms of an existing collective agreement should not be considered employees in the bargaining unit even though their hiring was inadvertent and not intended to foster a representation application. The fact that the employer may not have intentionally breached its contractual obligations is no answer to the prejudice which his actions may cause.

And further, in paragraph 26:

... Individuals illegally hired, transferred or retained in the bargaining unit should have no more right to bring a representation application or vote in it, than they would have if they had been properly engaged in accordance with the terms of the applicable collective agreement, or if the Board had postponed a determination of their rights in a representation application until the composition of the bargaining unit is returned to what it should be.

On the facts of the case before it, however, the Board in *Culliton Brothers* came to the following conclusion:

27. The instant case, however, does not exhibit the "mischief" with which the Board was concerned in *April Waterproofing*. The employer here has not hired persons contrary to the terms of a collective agreement, improperly transferred individuals into the unit contrary to the agreement, or engaged in other activities which undermine the contractual rights of union members under the agreement by which the employer is bound. Here, the subject employees were not "hired" at all. The individuals affected were pre-existing employees who were swept into the ambit of collective bargaining by operation of law. Nor is this a case where the employer has manipulated its employee list, withheld information from the union or the Board, or sought to mislead the union with respect to its employee complement to gain the advantages of unionization, only to take a different position in a subsequent termination application. There was no positive action by the employer here which would raise any concerns or call into play the reasoning of the Board panel in *April Waterproofing*. And, given the uncertainty surrounding the rights and status of the individuals affected by this application, we are not prepared to conclude that the fact that Culliton kept them in its employ constitutes improper interference or support which prejudices their right to seek termination of the union's bargaining rights. While there may be cases where the retention of employees, despite a challenge to their status,

may warrant careful scrutiny by the Board lest the employer is “padding the list”, we are not convinced that this is one of them. Nor are we satisfied that the approach in *April Waterproofing* should be adopted here.

8. The situation before the Board in the most recent case, *Inducon*, [1983] OLRB Rep. July 1038, was similar to that in *Culliton Brothers*. A Toronto company had performed work in Rainy River, as a result of which the Carpenters’ Union had become certified for its employees in that area. The same amendments to the *Labour Relations Act* in 1980 then brought all of the company’s employees under the Carpenters’ province-wide agreement. At that point the Carpenters’ Union filed a grievance asserting such extension of its collective agreement on a province-wide basis, and to the full Inducon “group” of companies pursuant to the related-employer provisions of section 1(4) of the Act. Those positions were sustained by the Board. Subsequently, a group of Inducon’s employees brought an application for a declaration terminating bargaining rights. Of the 19 employees employed in the unit on the date of the application, 12 had been hired prior to the date in 1980 when the union asserted the extension of its bargaining rights, and 7 had been hired after. None were hired pursuant to the hiring hall provision of the Carpenters’ province-wide collective agreement. The Board wrote:

14. The Board in *Culliton III* carefully distinguished the case before it from the facts in, e.g., *April Waterproofing*, [1980] OLRB Rep. Nov. 1577, where the employment of certain individuals was unlawful *from the beginning*; i.e., the employment relationship could not be formed without a violation of an already existing collective agreement. In *April Waterproofing*, the employer, just at the onset of the “open period”, hired two employees from a rival union in knowing violation of its existing collective agreement. A “displacement” application for certification by the rival union followed immediately. In refusing to find that the two persons illegally hired were “employees” in the bargaining unit for the purposes of the Act, the Board signalled its concern, later articulated further in *Thomas Construction (Galt) Limited*, *supra*, at paragraph 9, that such employer conduct creates:

9. ... a possible method of easy abuse by employers, particularly in the construction industry in relation to representation matters before this Board. Thus, for example, on a termination case an employer could choose to avoid his obligations under a collective agreement to seek employees from a trade union’s hiring hall and employ persons from either another trade union or totally antithetical to construction trade unions at the time when the open period for the collective agreement is approaching. In such circumstances, it would not be surprising if another union were to apply for certification or if the employees were to apply for termination of bargaining rights. The employer would have “fostered” such a representation application by laying the necessary ground work simply by avoiding his collective bargaining obligations with the trade union representing employees in a particular bargaining unit.

Thus the Board has not failed to interpret the Act in a manner which renders such conduct ineffectual, without requiring (it will be noted from *April Waterproofing* and the *obiter dicta* of *Culliton III*) further inquiry into the motive of the employer. Such employer initiatives so obviously place a union’s bargaining rights in jeopardy that the employer is presumed to intend the natural consequences of his acts. As the Board noted in *Culliton III*, at paragraph 25, conduct of this type on the part of an employer would appear to be a fundamental violation of section 64 of the Act as well.

15. From the Board’s analysis, particularly in *Culliton III*, it becomes apparent that the seven employees hired in this case after the 1980 amendments extended the application of the provincial agreement, and after the Carpenters’ gave notice to Inducon to that effect, stand in a different position from those employees hired prior. Inducon, in hiring its own employees in the face of that notice, must surely be said to have been acting at its peril. Such employees can be said to have at no time been “properly” or “innocently” hired, and no valid reason

exists to cause the Board to treat their status other than as it has, for example, in *April Waterproofing*, *supra*, and *Beef Terminal (1979) Ltd.*, [1981] OLRB Rep. March 244.

9. We agree with all of the foregoing statements of the law. The “trigger” incident for the employer to be acting at his peril in *Inducon*, however, was not the mere operation of law (in that case, the May 1980 amendment to the statute), but as well the assertion of the claim by the Carpenters’ Union in its letter to Inducon in July of that year. It was after that point that any hiring outside the terms of the Carpenters’ collective agreement became what the Board referred to in paragraph 14 of *Inducon* as a “knowing violation”.

10. The present case lies somewhere in between the situations in *Culliton* and *April Waterproofing*; as the Board ultimately found, there *has* been an extension of bargaining rights “by operation of law”, but all of the employees in question were hired *after* that extension took place. And, unlike the cases of *Culliton* and *Inducon*, there was here an overt act on the part of the respondents which gave rise to that operation of law. At the same time, however, the Board, in assessing the impact of any delay on the part of the Labourers’ in *this* case, has to contend with the fact of an innocent third party, the Carpenters’ Union, having expended efforts to organize the employees of Grager. See *Al Smith Plastering*, [1981] OLRB Rep. Feb. 129, and the cases cited therein.

11. Obviously the potential for mischief in a situation of unlawful hiring is, as the Board has repeatedly pointed out, considerable. Accordingly, the Board, particularly with its knowledge of the construction industry, has not hesitated to presume, in the words of *Inducon*, *supra*, that the employer intended the natural consequences of his acts. That presumption is rebuttable, however, in the face of cogent evidence, and the Board on the evidence before it in the “sale” application is unanimously of the view that the principals of Grager were acting in good faith, and did in fact believe that the new, merged undertaking was not the subject of the shelved Pierre Gratton Construction Inc.’s collective agreement. We are satisfied that the principals of Grager made no effort whatever to hide the operations of “Grager” from the intervenor Labourers’ Union; in fact, they willingly hired individuals whom they knew to have been members of the Labourers’ Union through their prior employment with “Gratton”. The “Grager” company was in the field bidding on and performing jobs in the high-profile Transitway project for a substantial period of time before the Labourers’, through their counsel, began to assert their claims. While the race is not simply to the swiftest, the Board can expect some measure of diligence in the unique world of construction, where unions know they must move quickly to organize or assert bargaining rights before a project is completed. Here the Carpenters’ Union expended its resources in a good-faith effort to organize the apparently unrepresented employees of “Grager”, and it is the decision of the Board that their application for certification is entitled to proceed, on the basis of the persons “employed” as of the date of the certification.

12. The Board finds that the 5 persons employed by the respondent Construction P. H. Grager Inc. on the date of this application were “employees” for the purposes of section 7(1) of the Act. Even if the additional 3 names raised by the intervenor were added to the list of 5, the applicant would still have filed membership evidence on behalf of more than 45 per cent of the unit. Since the best that the applicant can do in the circumstance of a displacement application is a vote in any event, the issue of the 3 additional names is, as the intervenor noted, not germane to these proceedings. The Board accordingly directs that this application for certification be determined by way of a representation vote between the applicant and the intervenor.



13. Having regard to the form of bargaining units initially sought by the applicant in this matter, that is, those not having been confined to carpenters and carpenters' apprentices, and to the fact that the respondent employed both carpenters and labourers on the date of the application, the Board is prepared to describe the voting constituencies in the terms of both a 144(1) application and a 144(3) application, in accordance with the decision of the Board in the *Aero Block* case, reported [1984] OLRB Rep. Sept. 1166, namely:

- (1) all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman; and
- (2) all construction labourers in the employ of the respondent in other than the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.

14. The respondent Construction P. H. Grager Inc. is directed to notify the Board forthwith when it obtains a job which involves the hiring of employees in either of the above-described voting constituencies.

15. The certificates issued with the Board's decision of May 16, 1984 are hereby revoked, and the applicant and respondent are directed to return their copies of the certificates to the Board forthwith.

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**1993-85-M PPG Industries Canada Ltd.** London Merchandizing Branch, Employer,  
v. Energy and Chemical Workers Union, Trade Union

Collective Agreement - Conciliation - Common mistake as to value of COLA fold-in - Whether rendering collective agreement void - Applicability of contract and common law doctrines to collective bargaining law - Whether Minister having authority to appoint conciliator

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members F. C. Burnet, P. O'Keeffe.

**APPEARANCES:** Martin J. Addario, R. J. Straub, and W. W. Mercer for the Applicant; Daniel Ublansky and Bryan Van Rassel for the Trade Union.

**DECISION OF THE BOARD;** January 31, 1986

1. This is a reference pursuant to section 107 of the *Labour Relations Act* in which the Minister seeks the opinion of the Board on a question of his authority to appoint a conciliation officer in the circumstances of this case.

2. After three meetings in May and June of 1985, the parties signed a memorandum

of agreement dated June 6, 1985. On June 10, 1985, the memorandum was shown to and approved by a majority of the members of the bargaining unit. There is no dispute between the parties that a collective agreement was entered into; rather, it is the position of the union that since both parties erred in their understanding of the amount of the cost of living allowance (COLA) yielded by the 1981 Consumer Price Index, there was a common mistake which should release the parties from their obligation to be bound by the agreement.

3. During negotiations, both parties mistakenly assumed that the employees were entitled to a 10 per hour increase based on the COLA clause contained in the previous collective agreement. That clause was tied to the 1981 Consumer Price Index. Neither party was aware that an accurate calculation under that clause would in fact entitle the employees to 21 per hour.

4. In the newly negotiated agreement, both parties agreed to an hourly wage increase of 3.5% annually. The 10 COLA increase was specifically referred to as follows:

The ten cents (10) cost-of-living allowance generated under the previous agreement has been folded in and is included in the above rates.

5. The evidence of Bryan Van Rassel, the union negotiator, whom we found to be an entirely credible witness, was that some weeks after the agreement was concluded, he reviewed the application of the COLA clause and advised the company that in his opinion, there had been a miscalculation of the effect of the COLA clause and that the employees were entitled to further monetary payments. The company agreed that under the wording of the previous agreement, there had in fact been an error and accordingly the employees were paid the additional amounts owed to them under that agreement. The company did not agree, however, that similar amounts were also owed to employees under the new agreement. Both parties acknowledged that if they had known that the COLA fold-in was 21 rather than the agreed upon 10, they would not have settled for the wage rates agreed upon in the Memorandum of Agreement.

6. The issue before the Board is whether this common mistake about the correct value of the COLA fold-in renders the collective agreement null and void. There is no suggestion that there was any fraud, misrepresentation or *mala fides* by either party. Each could easily have ascertained the correct value of the COLA fold-in and bargained accordingly. What the union agreed to and the bargaining unit ratified was specific and unequivocal. The increased hourly wage and the 10 fold-in were directly referred to in the agreement and accepted by both parties. No question of ambiguity arises, nor is this a question of detrimental reliance or of one party unfairly benefitting from the misunderstanding of the other, all of which could be addressed pursuant to the arbitration provisions of the collective agreement. In this case, both parties directed their minds specifically to stipulated amounts and agreed to them. Having done so, it is not now open to one of the parties to suggest that if they had been aware then of what they ought to have known and could easily have ascertained, they would not have entered into the agreement.

7. The Board in previous decisions has dealt with the unique nature of collective agreements and the inapplicability of many areas of contract or common law to the law of collective bargaining under the *Labour Relations Act*. Common law doctrines are apposite only to the extent that they do not conflict with the statutory parameters and underlying principles

of labour relations reflected in that legislation. The doctrine of common mistake, for example, like the doctrine of mutual mistake, where it does not go to the root of the agreement, does not operate to vitiate a collective agreement. See: *Sperry Vickers Division Sperry Inc. Canada* [1983] OLRB Rep. July 1208, *Universal Handling Equipment Company Limited*, [1979] OLRB Rep. April 356; *Re Puretex Knitting Co. Ltd. and Canadian Textile & Chemical Union, Local 560* (1975), 8 L.A.C. (2d) 371 (Dunn); and *Re Hamilton Medical Laboratories and County Medical Laboratory and Ontario Public Service Employees' Union* (1983) 10 L.A.C. (3d) 106 (Springate).

8. In the circumstances of this case, the parties entered into an agreement which falls within the purview of the s.1(1)(e) definition of "collective agreement". There is no basis for finding that the common mistake vitiates this agreement and we therefore find that there has been, and continues to be, a binding collective agreement in effect between the parties at all material times. We are therefore of the opinion that the Minister has no authority to appoint a conciliation officer in this case.

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**1439-85-R** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Quick Messenger Service**, a Division of 382525 Ontario Limited, Respondent

**Certification - Practice and Procedure - Union discovering change of heart by supporters - Requesting dismissal of certification application at commencement of hearing - Employer alleging non-pay and improper conduct in soliciting membership - Seeking inquiry and imposition of bar if allegations established - Employer request denied in circumstances**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *F. W. Murray* and *W. F. Rutherford*.

**APPEARANCES:** *Hugh Buchanan* for the applicant; *A. P. Tarasuk* and *Steve Andrews* for the respondent.

**DECISION OF THE BOARD;** January 16, 1986

1. The name of the respondent is amended to read: Quick Messenger Service, a Division of 382525 Ontario Limited.

2. This is an application for certification which originally came on for hearing before the Board on Friday, September 27, 1985. After hearing the parties' submissions, the Board indicated that the application would be dismissed, without bar, and that its reasons for this decision (announced orally and briefly at the hearing) would be issued later. Those reasons are set out below. For ease of exposition, we have used the term "employer" and "employee", even though it is the respondent's position, expressed in its reply, that it does not have any "employees", and that the individuals affected by this application are "independent contractors" who are not entitled to form or join a trade union.



3. At the opening of the hearing, the representative of the union indicated that he had learned, only that morning, that some former union supporters among the respondent's employee complement may have had a change of heart, and further that there might also be some defect in the union membership cards tendered in support of the certification application. He submitted that, as a practical matter, it made little sense to embark upon potentially protracted litigation in respect of an employee group whose support for the union might be equivocal. He was content that the application should be dismissed.

4. Counsel for the respondent asserted that, in addition to dismissing the application, the Board should impose a "bar" - that is, decline to entertain a new application for certification from the applicant for a period of up to ten months. A bar of that kind is contemplated by section 103(2)(i) of the Act. It would prevent the applicant union from seeking to represent the respondent's employees for the stipulated period. By the same token, it would also prevent those employees from requesting this Board to certify the applicant as their representative - even though that might well be the wish of the majority of them.

5. Counsel for the respondent told the Board that, in his experience, the circumstances of this case were quite unusual. He had been advised by his client that certain employees of the respondent, who had once been union supporters and had even solicited membership documents from their fellow employees in support of this application, had, in discussions with their employer, indicated a change of heart and revealed that a number of the membership cards which they themselves had collected had not been accompanied by the one dollar payment necessary to meet the requirements of the Act (see section 1(1)(l)). Since the membership cards contain a space where the "collector" signs to verify that the one dollar payment has been made, this employee assertion (related to counsel "secondhand") amounts to an acknowledgement that they had themselves signed a document fraudulently attesting to something which was untrue. We mention the "secondhand nature" of counsel's information, since it was not clear how these discussions came about, and counsel indicated, quite rightly, that he was reluctant to pursue them because the Act quite clearly prohibits employer "interference" with the employees' right to join a trade union if that is their wish. Counsel indicated that he did not think it would be proper for him to interrogate employees in order to verify the information that he had received. He urged the Board to undertake its own investigation - which, of course, would involve weighing the circumstances in which these alleged improprieties and "changes of heart" had come to light.

6. Counsel for the respondent further told the Board that he had been advised that, in at least one instance, the irregularity had come to the attention of a union official. He had also been told that there had been misstatements of fact which may have influenced certain employees to join the union. None of these charges were particularized or filed with the Board prior to the hearing, nor did the union learn of them until just before the hearing. Counsel for the respondent explained that he had only learned of them recently and was concerned that he was being "set up". Ironically, the applicant's organizing director, who appeared at the hearing, expressed the same view.

7. In summary then, the respondent urges the Board to initiate its own investigation into whether some of the individuals who have signed membership cards indicating support for the union have not made the requisite payment, and to schedule hearings to consider these allegations, as well as the possibility that there may have been misrepresentation or undue

influence in the way in which the membership cards were collected. Counsel argued that if, at the end of such inquiry and such Board hearings, the Board was satisfied that the allegations had been made out (in whole or in part), then the Board should exercise its discretion under section 103(2)(i) of the Act, to bar the applicant from making any further application to represent these employees for a period of ten months. The applicant, as mentioned, argues that we should simply dismiss the application and leave it at that.

8. We might note that the employees potentially affected by this application were duly notified of the hearing and a number of them were in attendance. No one appeared on behalf of those employees to complain about the manner in which the organizing campaign had been conducted or the way in which membership cards had been collected. Nor were there any submissions on the employer's request to bar any further certification application for a period of ten months.

9. Having considered the respondent's representations, the Board determined that the application should be dismissed without further inquiry and without bar, but, of course, without prejudice to the respondent's right to raise any legally relevant matters, should a new application for certification be made by the applicant at some time in the future. We made this determination for a number of reasons. In the first place, as we have already noted, the respondent's initial position is that it has no employees, and that none of the individuals potentially affected by this application are covered by the *Labour Relations Act* or entitled to join a union. If that position were sustained (and that would require evidence) then the charges or presence of a temporary bar would be quite irrelevant because the affected individuals would not be entitled to join a union in any event. Moreover, it was apparent that even if the affected individuals are employees of the respondent, to investigate and litigate the respondent's allegations (assuming they were properly particularized as the Rules require) would necessarily entail protracted and expensive proceedings which would consume several months, given the Board's current hearing calendar. While the respondent expressed concern about maintaining the integrity of the Board's processes (a concern which the Board shares), and the respondent pointed to the possibility that improprieties may have tainted the mechanism for ascertaining employee wishes, it is difficult to see how the employees' interests would be advanced by the course of action which the respondent seeks. The respondent is not suggesting, for example, that the Board conduct a secret ballot vote to "clear the air" and ascertain the true wishes of the employees. Indeed, the position taken in the respondent's pleadings is that the persons affected by this application are not entitled to join a trade union at all. And if the Board undertook the inquiry urged upon us by the employer, what would be the result? The hearings might well consume almost as much time as any bar which the Board would ultimately impose and during this process the employees (who have already indicated some apparent appetite for collective bargaining) would be precluded from seeking representation by any other trade union and would have their wages and working conditions frozen pursuant to section 79 of the Act. Finally, it is our opinion that the bar contemplated by section 103 is not intended to be a "penalty" for improper conduct on the part of employee supporters of a union or even union officials. It is a means to restore a temporary equilibrium to employer-employee relationships which may have been disturbed by several certification applications in close succession or by the "politics" associated with a representation vote.

10. Having considered the respondent's submissions and the various interests involved, we are satisfied that the application should be dismissed without bar but, as noted, without prejudice to the respondent's right to raise any legally relevant matters in any later certification application made by this or any other union.

**1636-85-R** Labourers' International Union of North America, Local 1081, Applicant,  
v. Rowad Pipeline Company Ltd., Respondent

Membership Evidence - Practice and Procedure - Whether oral evidence as to circumstances under which dollar payment made permitted - Board not taking technical approach in deciding whether dollar paid directly to person signing as collector - Discrepancy in date of signing not invalidating card

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *I. M. Stamp* and *H. Kobryn*.

**APPEARANCES:** *D. Chiasson* for the applicant; *Louisa Davie* and *Keith Mills* for the respondent.

**DECISION OF THE BOARD;** January 21, 1986

1. In this application for certification the applicant filed 4 combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
2. The respondent filed a reply, a list of employees containing four names on schedule "A" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.
5. The Board further finds that this application for certification does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 117(e) of the *Labour Relations Act*.
6. Section 102(14) of the Act gives the Board the discretion to determine applications for certification in the construction industry without the need of a hearing. The Board usually exercises its discretion to process applications without a hearing unless the pleadings raise an issue which requires that the parties have an opportunity to present evidence and make representations respecting the application. In the instant case, the reply and lists of employees filed by the respondent Rowad Pipeline Company Ltd. ("Rowad") raised an issue of the number of employees at work on the date of the application in the bargaining unit sought by the applicant Labourers' International Union of North America, Local 1081 ("the union"). This issue caused the Board to authorize a Board Officer to inquire into and report to the Board on the lists of employees and the composition of the bargaining unit. Subsequent to the parties meeting with the Board Officer, they agreed that there were two employees in the unit and that there was no need for the Board to go further with its inquiry.



7. The agreement of the parties ordinarily would have allowed the Board to complete the processing of the application without need for a hearing. Shortly after Rowad and the union reached their agreement, however, Rowad's solicitors wrote to the Board stating that it had come to the attention of Rowad that one of the employees " ... did not pay one dollar (\$1.00) as required pursuant to Section [1(1)(i)(ii)] of the *Labour Relations Act*." The Board, following its customary procedure, assigned one of its officers to interview the employee. The interview led to the employee signing a statement that, amongst other things: he had signed a blank application card without reading it, thinking that he was signing an application for a job; he could only recall signing the card in one place, not two; and, he was not asked to pay any money and did not pay any money to any representative of the Labourers' International Union of North America.

8. On the basis of that information, the Board notified the parties that it was listing the application for hearing to inquire further into the allegation that the employee made no payment to the union and into the quality of the evidence of membership submitted by the union in support of its application. The Board also advised the parties that it had summonsed to attend the hearing the following persons whom the Board believed to have knowledge of the facts: Victor Martins, Ernie Bairos and David Strang. Martins is the employee whose application for membership in the union is at issue. Ernie Bairos is the business manager of the union whose signature appears on Martins' application card as the collector of a one dollar payment. David Strang is assistant business manager for the Ontario Provincial District Council ("the Council") of the Labourers' International Union of North America and a lawyer. He had signed on behalf of the union the Form 80 declaration respecting membership evidence. The witnesses attended at the hearing and each was examined by the Board, followed in turn by counsel for Rowad and the union. Rowad did not call any witnesses. The union called Bill Suppa, an organizer for the Council who was assisting the union in its organizing campaign and who had earlier assisted a sister local in an organizing campaign respecting Rowad's employees in a different geographic area of the construction industry.

9. The Board has reviewed and weighed the evidence of the witnesses having regard to their recollection of the events about which they were testifying, the firmness of their recall, their ability to relate clearly to the Board the events and matters about which they were testifying, their ability to resist the influence of self-interest and their general demeanour as witnesses. The Board ordered the exclusion of witnesses, but Suppa, as advisor to counsel for the union, remained in the hearing during the testimony of the Board's three witnesses. There were clear contradictions between the evidence of Martins and Bairos as well as internal inconsistencies in their testimony. While these problems were not sufficient to discount their evidence altogether, the Board, in arriving at its conclusions of fact respecting the central issue of whether Martins paid any money to the union in respect of dues or initiation fees, has preferred the evidence of Suppa notwithstanding the fact that he heard the testimony of the other witnesses prior to testifying himself. The Board found him generally to be a credible witness. The Board has also reviewed and considered the submissions of counsel for the parties respecting the relative credibility of the witnesses, the evidence in general and the relevant law applied to that evidence. The findings of fact and the conclusions made herein have been made having regard to the Board's review of the evidence of the submissions of counsel.

10. The Board is satisfied on the evidence that Martins in fact paid one dollar to a representative of the union with respect to dues or initiation fees of the union, signed the

application card at issue in both places where it required his signature and knew that he was signing an application for membership in the union.

11. That is not the end of the matter, however. In the course of the Board's inquiry, two facts emerged which, according to respondent counsel, make Martins' membership application unreliable on its face. First, the card is dated October 2nd, 1985. The oral evidence at the hearing places the date of signing and the payment of the \$1.00 as having taken place on October 3rd. Second, the application card bears Bairos's signature as collector, in other words, where the card calls for the "Signature of Actual Recipient of Above Money". When Bairos asked Martins for payment of the \$1.00, Martins offered a \$2.00 bill. Bairos did not have change. Suppa gave Martins \$1.00 in change and received the \$2.00 bill from him in return. He kept the two dollars and returned to Bairos' office with him. At the office, Bairos took out a cash box and gave Suppa \$1.00 and received from him the \$2.00 bill. He took another dollar bill and placed it with the card in a file which he eventually turned over to Strang.

12. The Form 80, "Declaration Concerning Membership Documents, Construction Industry", which was filed together with the two membership documents contains no reference to the two circumstances just described. Paragraph 3 of Form 80 applies to the form of membership evidence at issue here and states as follows:

*(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees)* On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

The Board is satisfied from Strang's evidence that he made all of the proper inquiries of Bairos and of the collector of the other membership document before signing the Form 80. Therefore, were the Board to make a finding that the Form 80 declaration is defective, and it makes no finding either way at this time, the defect would result from Bairos' failure to disclose to Strang the precise manner in which the one dollar was paid by Martins and not because Strang failed to make the proper inquiries.

13. Counsel for Rowad argues that the Board should reject Martins' card because on its face it contains two untruths. First, the card has been put forward as having been signed and the dollar payment having been received on October 2nd when in fact these actions took place on October 3rd, 1985. Second, Bairos signed as the actual recipient of the one dollar paid, when in fact, Suppa was the actual recipient. Those two flaws in the document, coupled with the facts that Bairos is a paid, full-time employee of the union and the business agent who was the collector on the second card was responsible to Bairos, should cause the Board to place no reliance on either card, according to counsel.

14. The Board disagrees with counsel that Bairos was not the actual recipient of the one dollar paid by Martins. Bairos and Suppa were together when they approached Bairos about joining the union and when he signed the card and paid the dollar. Martins knew both men to be representatives of the union. It was Bairos who asked Martins for payment of the

dollar and the fact that, because of the problem with respect to change, the money was actually given to Suppa does not alter the fact that it was being paid to Bairos. To find otherwise in these circumstances would be taking a far too technical view of the factual circumstances. With respect to the date, the important question is whether, on the terminal date of the application, Martins was a member of the union within the meaning of section 1(1)(l) of the Act, and not whether he became a member within the meaning of that section on October 2nd or October 3rd. The terminal date set for this application was October 15th, 1985, so clearly Martins was a member of the union within the meaning of the Act on that date.

15. Rowad's counsel argues that the Board ought not to accept oral evidence respecting how and when Martins paid the dollar and signed the card. But, such evidence does not go to substantive issue of whether the dollar was paid, and, therefore, is clearly within the scope of evidence which section 73 of the Rules of Procedure under the Act permits the Board to accept. In these circumstances, the Board accepts the oral evidence and is satisfied that the membership application filed on behalf of Martins is evidence that he was a member of the union within the meaning of the Act at the times material to this application.

16. The Board finds that all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees appropriate for collective bargaining.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 15, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

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**1879-85-M Dan Therrian, Herbert Black, Ray Dobson, Ray Montgomery, Charlie Rankin, Bob Banks, Kerry Johnson, Sharon Vyse, Applicants, v. Service Employees Union Local 204, Respondent**

**Employee Reference - Reconsideration Security Guard - Individuals claiming to be guards and seeking exclusion from all employee collective agreement - Whether entitled to apply under s.106(2) - Prohibition against Board certifying unit including guards with other employees not preventing employer agreeing to such inclusion in collective agreement - Certificate spent once collective agreement signed - Reconsideration of certification denied**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

**DECISION OF THE BOARD;** January 26, 1986

I

1. This is an application purportedly made under sections 106(1) and 106(2) of the *Labour Relations Act* by a group of individuals who describe themselves as “guards” and seek exclusion from a collective agreement by which they are currently bound. The applicants wish the Board to hold a hearing, determine whether they are “guards”, and, if they are, to direct that the collective agreement does not apply to them. Alternatively, the applicants urge the Board to reconsider the decision and certificate establishing the union’s bargaining rights some twenty years ago. Again, their wish is to be excluded from the bargaining unit. The relevant provisions of the *Labour Relations Act* are as follows:

12. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

106.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, direction, declaration or ruling.

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

Rules of Procedure

71.-(1) Where an application or complaint does not, in the opinion of the Board, make

out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its discretion state the reason for the dismissal.

## II

2. Section 12 of the Act deals with “guards”. It does not define what a “guard” is. The Board has consistently held that in order to be a “guard” within the meaning of section 12, and individual must exercise monitoring functions of a quasi-supervisory character with respect to *other employees in the bargaining unit*. In other words, they must perform duties (such as searching employee lunch boxes or investigating employee theft) which clearly place them in a conflict of interest with those employees. Employees who are essentially “watchmen” who protect the employer’s property against third parties but do not intrude (as the employer’s agent) in the employer-employee relationship, will not be treated as “guards” for collective bargaining purposes.

3. This Board approach was affirmed by the Supreme Court of Ontario (Divisional Court) in *Wells Fargo Armcar Inc. vs. Ontario Labour Relations Board et al.*, (1982) 36 O.R. (2d) 361. There the persons in question operated armoured cars, wore uniforms, carried fire arms, and were commonly described as “guards”. The Board held that they were not “guards” for collective bargaining purposes. The Court agreed. In summary, then, section 12 is there to protect the interests of the *employer*: to ensure that persons whom the employer requires to monitor or investigate others would not face a conflict of interest between his responsibilities to that employer and his loyalties to other employees in the same bargaining unit.

## III

4. We have begun by commenting upon the rationale underlying section 12 for two reasons:

1. It is by no means clear that a person who thinks he might be a guard (within the meaning of section 12) can make an application under section 106(2) when his employer has not done so or may take a contrary view; and
2. even if an employee could make such application on his own and was able to persuade the Board that he was a “guard” within the meaning of section 12, it would not automatically result in his exclusion from the bargaining unit.

5. The first question was dealt with in *York University*, [1978] OLRB Rep. Aug. 790. There, as here, a group of employees described as “security officers” asserted that they were “guards” who should be excluded from a bargaining unit. The Board had this to say:

5. The issue to be decided by the Board is whether a question has arisen during the operation of the collective agreement as to whether certain persons are guards. If no such question has arisen then there can be no referral to the Board under section 95(2). Certainly there is no question arising *between the parties* to the collective agreement as to whether any

of the persons are guards and there is no dispute but that such persons - irrespective of their job status - are clearly and unambiguously covered by the collective agreement. Further, it is clear to us, (and we believe to the parties before us) that even if the Board were to make a finding that such persons were not "guards" within the Act, such finding would not result in disturbing any of the rights or duties flowing from the current collective agreement or in any way change the administration of the current agreement during its remaining period of operation. The strictures imposed on the Board by sections 11 and 12 of the Act in respect to its powers to certify a trade union are similar. However the Legislature saw fit, in respect to a trade union engaging in activities defined in section 12, to take the further step in section 40 of the Act to declare that any agreement entered into shall not be treated as a collective agreement under the Act. The employer is entitled, but not required, to enter into an agreement covering a mixed unit of guards and non-guards. The same kind of statutory voiding of the agreement in the event of a contravention of section 12 is not provided in respect to a trade union which the Board is prohibited from certifying under section 11. We must, therefore, assume that even if we were to make the finding sought by the applicants the agreement would continue to subsist and be applied. The applicant counters that the time is approaching when the collective agreement will be subject to re-negotiation and because of the strictures laid on the Board in section 11 of the Act it is essential that the applicants know whether their bargaining agent is a trade union such as the Board would certify as a bargaining agent to represent guards. It is argued that section 11 may justify the employer in refusing to bargain with a bargaining unit that includes both guards and non-guards. However, the employer has never refused to bargain with the respondent union in respect of the existing unit, nor is there any suggestion that it intends to do so at the expiry of the subsisting agreement. The bargaining relationship extends over several collective agreements and no such objection has ever been made.

6. In our view there must be a present question arising between the parties to the collective bargaining relationship before there can be a section 95(2) referral. Certainly, it is clear that for a question to arise "in the course of bargaining for a collective agreement" it would be necessary for such question to be raised in the "bargaining forum" and must therefore be a question between the parties to that bargaining relationship i.e. the bargaining agent and the employer: we are of the opinion, that it is no less implicit in the language of the section that the question which must arise during the period of operation of the agreement must also be a question between the parties to that agreement.

Thus, the Board concluded that since there was no "question" between the bargaining parties to the collective agreement, no application under section 106(2) could be made.

6. The Board reached a similar conclusion in *Central Park Lodges of Canada*, [1980] OLRB Rep. Oct. 1373. There, the application was purportedly made by employees who claimed that they exercised "managerial functions" and were therefore excluded from the bargaining unit by virtue of section 1(3)(b) of the Act. After reviewing the purpose of section 1(3)(b) and various earlier Board decisions, including *York University*, the Board decided that where neither of the bargaining parties is questioning an individual's status section 106(2) is not available.

7. And what if the applicants really are "guards" in accordance with the test affirmed in *Wells Fargo Armcar*, *supra*? Would that mean that they are no longer covered by the collective agreement? The answer is no - for the reasons discussed in *York University*, *supra*. Section 12 prohibits the Board from including guards in the same bargaining unit with other employees. Section 12 appears in that portion of the Act dealing with certification, and there is no doubt that on an application for certification, the Board would be precluded from including guards in a bargaining unit. Moreover, an employer cannot be compelled to bargain with a trade union purportedly representing guards if it admits to membership persons other than guards. But guards remain employees under the Act. Nothing prevents an employer from



*agreeing to a collective agreement* which encompasses guards. The fact that the Board might not be able to certify such bargaining unit does not mean that the employer cannot waive its objection and voluntarily agree to include guards within the scope of a negotiated collective agreement. No doubt the union could not insist upon such concession, but for a particular employer it might make sense - either because the employer does not envisage any “conflict of interest” problems or because, even if there is such possibility, he would prefer to have one somewhat broader bargaining unit rather than create a situation where, at some time in the future, he might have to deal with two units and two different unions. Accordingly, even if we were to hold hearings, receive evidence, and conclude that there was the kind of conflict of interest to warrant a conclusion that the applicants were “guards”, they would still remain part of the bargaining unit covered by the collective agreement unless and until *their employer* resists their inclusion. While, from some perspectives, this may seem a curious result, it must be remembered that the exclusion of guards does not turn upon individual employee wishes or perceptions, but rather a legislative concern to protect the interests of the employer.

8. If there is no basis under section 106(2) to launch an enquiry into the applicants’ status, is there a basis under section 106(1)? The Board’s files reveal that the union was originally certified around 1965 or 1966. Can and should the Board reconsider a decision and certificate issued twenty years ago? Again, the answer is no; and if it were otherwise, no Board decision would never be final as the Act clearly contemplates. There is nothing before the Board to indicate that any “guard question” ever arose at the initial certification hearing, or later at the bargaining table as the union and the employer negotiated successive collective agreements. Perhaps the bargaining parties never thought there was a problem. Perhaps the applicants (acting without legal counsel) have not understood the purpose, meaning and effect of the “guard” provisions of the Act. We need not speculate. We are not inclined to roll back the clock or consider an issue which may not even have been raised in circumstances which were undoubtedly different twenty years ago. Furthermore, it is difficult to see how that exercise can possibly benefit the applicants who are now bound by a collective agreement which is not dependent for its validity upon the original Board certificate. As the Chief Justice of Canada once remarked in *Beverage Dispensers and Culinary Workers Union, Local 835, et al. v. Terra Nova Motor Inn Ltd.*, 74 CLLC 14,253: “Once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent”. Whatever the original Board decision may have been or this panel’s present opinion, the fact remains that the applicants are bound by the collective agreement and we have no authority to declare that they are not.

9. For the foregoing reasons the application cannot be made under section 106(2) by the applicants and, in any event, does not make out a *prima facie* case for the relief requested. This proceeding is therefore terminated.

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**2342-84-U The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 27, Complainant, v. Sparton of Canada Limited, Respondent**

**Remedies - Unfair Labour Practice - Prior decision finding bad faith bargaining by employer and directing that employees be provided 3 working days off with pay - Employer retroactively paying employees wages for 3 days they were on lay-off - Employer complying with Board order**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. H. Wightman* and *K. Rogers*.

**DECISION OF THE BOARD; January 10, 1986**

1. This is a section 89 complaint in which the Board, on September 17, 1985, issued a decision which concluded as follows:

18. The Board accordingly finds that the respondent has acted in violation of section 15 of the *Labour Relations Act* in purporting to modify its offer for a collective agreement after permitting the complainant to accept it. The respondent is thus directed by the Board to enter into a collective agreement with the complainant, effective, as in the past, from the date of the membership's acceptance (October 3, 1984), on the basis of the company's oral offer of "two years - no change". As this decision has clarified, that offer includes an uninterrupted Christmas shutdown of eight paid holidays.

19. That will accordingly be the form of the Christmas shutdown in 1985-86, the second year of the contract. As the 1984-85 year has already passed, however, and a Christmas shutdown of only five paid holidays observed, we direct the respondent to provide each of the employees in the bargaining unit who was also employed as of December 27, 1984, with 3 additional working-days off with pay at a time to be scheduled by the respondent, but not later than December 23, 1985.

20. In light of our conclusion that the respondent acted honestly, although erroneously, in this matter, we are not of the view that any additional form of relief requested by the complainant, including what has been termed a *Swan Tours* form of damages, are appropriate.

21. The Board will remain seized of this matter in the event any dispute exists over the implementation of the order which the Board has made.

2. Unknown to the Board, employees in the bargaining unit had by September 17th already been placed on notice of indefinite lay-off, to be effective October 18, 1985. Further, all but 3 of the employees in the bargaining unit were apparently placed on temporary lay-off without notice for 3 days, being September 25, 26 and 27. The complainant received the decision of the Board in this matter partway through this 3-day lay-off, and it appears the respondent employer may have done so also. When the employees returned to work, they were made aware of the respondent's intentions concerning the Board's order in the following Notice:

We have received a decision of the Ontario Labour Relations Board with regard to the Christmas holidays for 1984.

To comply with the decision, we have chosen to pay all eligible employees for the time away from work on September 25th, 26th and 27th.

Arrangements will be made in the near future to allow time-off with pay for those employees who were at work on the above stated days.

The complainant takes issue with the respondent's efforts to, in the complainant's words, "characterize a previous lay-off retroactively as a three day paid holiday", and argues that the Board's order has not been complied with.

3. The Board, having remained seized with the question of implementation, and having reviewed the submissions of the parties, is of the view that the respondent's actions constitute compliance with the order of September 17, 1985. While events did not unfold exactly as the Board itself had anticipated, the fact is that the Board in its decision acknowledged that, with respect to 1984, the clock could not be turned back, and, in the circumstances of this case, awarded no compensation for the loss of a continuous shutdown other than an award of 3 additional days off with pay. It was left to the respondent to designate the dates which would be utilized to meet this requirement, so long as those dates occurred no later than December 23, 1985. That has been done. The respondent was to bear the burden of, and the various employees were to receive the benefit of, 3 days that the employees would not be required to work, but for which they would receive full pay. That has also been done. In fact, we note that it has been done in the only way it *could* have been if employees, prior to dates being designated, were to sever from the company, or be on lay-off through December 23, 1985. It is our decision, therefore, that the respondent's actions do reasonably meet the minimum requirements for compensation set out in the Board's order regarding the loss of 3 paid holidays for 1984.

4. The final issue is whether 2 employees who had in fact left the employ of the company *prior to the date of the Board's decision* of September 17, 1985, are entitled to the benefit of the Board's order. The material portion of the order, again, reads:

... we direct the respondent to provide each of the employees in the bargaining unit who was also employed as of December 27, 1984, with 3 additional working-days off with pay at a time to be scheduled by the respondent, but not later than December 23, 1985.

The complainant argues that the Board would not have intended that 2 employees in the bargaining unit in December 1984, at the time when the respondent wrongfully deprived them of 3 additional days of holiday, would not be entitled to recover their share of damages therefor. In the alternative, the complainant requests the Board to exercise its power under section 106(1) of the *Labour Relations Act* to vary its original decision to make it clear that these 2 employees are so entitled. The respondent argues that it has correctly interpreted and implemented the Board's award, and that the Board is now *functus*.

5. Section 106(1) provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

It is doubtful whether the doctrine of *functus officio* can apply to the Board at all, in light of the language of section 106(1). However, the power to vary a decision must, in the interest



of finality, be exercised only in cases where the circumstances clearly justify it. The respondent has correctly interpreted the Board's award as it was written, and it is our view that the respondent is entitled to an opportunity to reply, if it wishes, to the question of reconsideration raised for the first time in Mr. MacLean's final letter of November 19, 1985. The Board accordingly grants the respondent to January 24, 1986 to do so.

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**1946-84-M International Brotherhood of Electrical Workers, Local 120, Applicant, v. State Contractors Inc., Respondent**

**Construction Industry Grievance - Whether high time premium payable for work - Proper means of calculating distance from ground - Meaning of "subject to a direct fall" - Extrinsic evidence permitted to establish existence of latent ambiguity**

**BEFORE:** *Harry Freedman*, Vice-Chairman, and Board Members *R. D. McMurdo* and *L. Lenkinski*.

**APPEARANCES:** *B. Fishbein* and *W. Arnezeder* for the applicant; *G. Grossman*, *J. Vermeulen* and *E. Roberts* for the respondent.

**DECISION OF THE BOARD;** January 20, 1986

1. This is a referral of a grievance to arbitration by the Board pursuant to section 124 of the Act which alleges a violation of the provincial agreement that is binding upon the applicant and the respondent. The grievance claims that the respondent has contravened clause 900 C.3 of section 21 - Local Appendix - Local Union 120 by failing to pay the premium required by that clause. Clause 900 C.3 provides:

"Where workmen are required to work on equipment located 18 m to 30 m from the ground on supporting structures or open platforms, where a workman is subject to a direct fall, including trusses, stacks, towers, tanks, bosun chairs, swing or rolling scaffolds or similar equipment, a premium of one-quarter (1/4) time above his regular rate will be paid and over 30 m he will be paid double the regular rate of pay. Work covered by this clause shall not necessarily be rotated among the workmen on the job."

2. The construction project to which this grievance relates was the renovation and construction of the Kellogg's food processing plant in London, Ontario. At the first day of hearing of this matter, the parties jointly requested that the Board take a view of the construction project. The Board was accompanied by counsel and the parties. During the view the Board received comments from the parties or counsel only in the presence of both counsel.

3. The respondent performed electrical work on production modules that were housed inside one large room that was approximately 30 meters high. The room was inside a newly constructed building that was an addition to an existing Kellogg's building. The modules were erected on the floor of the room with the top of the modules approximately 26 meters from the floor. An overhead crane moved across the ceiling of the room and cleared the top of the modules by approximately 1.5 meters, although some portions of the top of the modules were closer to the crane than others.

4. The production modules were built to accommodate a new concept in automated washing of food processing machinery. The modules were constructed with steel grate floors and steel columns. The food processing equipment and machinery were located throughout the interior of the modules at different levels so that the floors or levels of the modules were often irregular in area, with walkways around the machinery or equipment rather than open floor space. There were openings in each of the levels, although the openings were not always in a vertical line. That is, there were openings at one level that only had a vertical drop to one or two lower levels. It was not established whether there were any interior openings in the levels that were 18 meters or more from the floor of the room that had a direct vertical line to the floor. Around the perimeter of the production modules' levels and around any permanent openings in the interior of the modules were guard rails made of 1 1/2 inch tubular steel with a top rail approximately four feet above the floor of each level of the module and a middle rail between the floor and the top rail. Vertical posts supporting the guard rails were approximately 8 feet apart and there was a kick plate 4 inches high and 1 inch thick on the edge of the floors. The modules were designed so as to permit the automated washing equipment to do both an interior and exterior cleaning of the food processing machinery and equipment by caustic liquids and rinses with those liquids and rinses draining through the modules to the floor of the room.

5. The room containing the modules was part of an addition to the existing Kellogg's building. Access to the modules was had from the floor of the room in the new building and from the different conventional concrete floors of the building.

6. The respondent's employees worked on equipment and wiring throughout the modules. There was wooden scaffolding around the exterior of the modules and plywood placed over the steel grate floors of the modules. Plywood was also placed over the interior openings in the modules creating temporary floors or scaffolding on which the respondent's employees worked.

7. The respondent paid its employees the premium under clause 900 C.3, referred to by the parties as the "high time" premium for work performed 18 meters or more above the floor of the room when the employees worked on the scaffolding around the exterior of the modules and when they worked at the top of the modules at points where there was less than five feet of clearance between the employee and the overhead crane. The top levels of all of the modules were over 18 meters from the floor of the room. The respondent did not pay high time to employees who worked on the temporary floors or scaffolding over the interior openings that were on levels 18 meters or more from the floor of the room unless there was a direct uninterrupted vertical drop of 18 meters or more from the interior platform to the floor of the room or to another level of the module. The respondent was unsure whether there was any such interior scaffolding in the modules, but if there was, it paid high time to the employees who worked on such scaffolding. The respondent did not pay the high time premium to employees who worked within the steel guard rails' around the perimeter of the levels, regardless of whether they worked at the edge of the levels or worked on equipment or wiring by reaching through the guard rails.

8. The union's position can be stated simply. It claimed that any employee who worked 18 meters or more above the floor of the room was entitled to the height pay premium. The company contended that only the employees who were subject to a direct fall of 18 meters

or more were entitled to receive height pay. The company submitted that the production modules were not supporting structures, but rather were analogous to a permanent building where employees, no matter where they work within the interior of the building, do not receive the height pay premium.

9. The applicant introduced a great deal of extrinsic evidence as permitted by the Board's oral ruling that was issued in writing on March 4, 1985. In that ruling, the Board stated:

"The decisions of the High Court in *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur (Inc.)*, [1969] 1 O.R. 469; 3 D.L.R. (3d) 161 and the Court of Appeal in *Noranda Metal Industries Ltd. v. IBEW, Local 2345* (1983), 44 O.R. (2d) 529 suggest to us that before extrinsic evidence can be properly used in interpreting a collective agreement, the interpreter of that agreement, in this case, this panel of the Ontario Labour Relations Board must be satisfied that there is an ambiguity in the collective agreement.

We find that there is no patent ambiguity disclosed in Clause 900 C.3 of the agreement. While there may be differing interpretations of collective agreement language, we believe that merely because two or more parties disagree over what the language of an agreement means does not give rise to a patent ambiguity.

However, counsel submits that he wishes to adduce evidence to also establish a latent ambiguity in the language. Since both the *Noranda* and *Leitch* decisions stand for the principle that a board of arbitration should admit extrinsic evidence for that purpose, we are of the view that counsel for the applicant may introduce extrinsic evidence to establish that there is a latent ambiguity in existence."

10. The extrinsic evidence led by the applicant related to a number of construction projects where the high time premium was paid. The evidence established that other employers bound to the predecessor of the provincial agreement that was before us had paid high time to employees when they worked on structures similar in appearance and construction to the modules at Kellogg. The Board was referred to a permanent structure at a Domtar salt mine where employees were paid the high time premium when they worked 18 meters or more, or, at that time, 60 feet, above the floor of the mine. There was also evidence relating to construction projects at the Zymaize plant, where employees worked on a large platform that was on top of silos, and on platforms and walkways on the top of the roofs of the buildings. The platform on the top of the silos was made of concrete. There was also work done on a tower that was located on the top of that platform. The structure around the tower, the walkways, and the platforms on the top of the buildings at the Zymaize project were constructed of steel grate floors and steel handrails that were similar to the construction of the modules at Kellogg.

11. The Board also heard evidence relating to the construction work done by members of the applicant at Federal White Cement, Stelco Lime and Beachville Lime. Employees were paid the high time premium when they worked on structures with steel grate floors and handrails that were located around or on the top of silos, towers, stacks and conveyors, as well as at the side of buildings. The Board was also told of work done at the Grand Theatre on a platform made of a steel grate floor that was located over 60 feet above the stage in the Theatre.

12. The applicant also established that another electrical contractor at the Kellogg's project, Canal Electric, paid its employees for all of the work done on the modules that was performed 18 meters or more above the floor.



13. The respondent introduced evidence to show that the high time premium was not paid in situations where employees were at greater of risk of falling than they were subject to at the Kellogg's project. All of the respondent's evidence related to the construction of institutional or commercial buildings where employees who were working on scaffolding, concrete floors and on formwork prior to and while concrete floors and columns were being poured or at the edge of the perimeter of the floors before any walls were constructed, were not paid the high time premium.

14. The respondent was the principal electrical contractor on the Kellogg's project and its employees performed many thousands of hours of work on the production modules. Approximately 40 per cent of the work that was done by the respondent on the production modules was done 18 meters or more above the floor of the room. Canal Electric did between 300-500 hours of work on the modules 18 meters or more above the floor. That portion of Canal Electric's work was a small part of its contract on the Kellogg's project.

15. Counsel for the applicant contended that the evidence established that the payment of high time arose when two conditions were met. Firstly, the equipment to be worked on was 18 meters or more from the ground on an open platform or supporting structure. Secondly, if any individual workman working on that supporting structure or open platform 18 meters or more from the ground was subject to a direct fall, all work on that structure or platform was classified as work for which high time was to be paid. Counsel submitted that the extrinsic evidence demonstrated that employees' receipt of the high time premium did not depend on whether they were subject to a direct fall, but only that they worked on platforms or supporting structures that were classified as coming within the high time premium clause because at least one employee was subject to a direct fall.

16. In our opinion, the extrinsic evidence does not establish a latent ambiguity in clause 900 C.3 of the agreement. Much of the extrinsic evidence relied on by the applicant to support the proposition that high time is paid to all employees who work 18 meters or more above the ground on supporting structures or open platforms with only one employee on that platform or structure being subject to a direct fall is equally consistent with the high time premium being paid as a result of the individual employees who received the high time premium being subject to a direct fall, or because the work was done on stacks, towers, or tanks. The clause obliges employers to pay the high time premium to employees working on supporting structures or open platforms 18 meters or more above the grounds only when the employees so working are subject to a direct fall. The balance of the clause provides that the employees who work on the types of structures enumerated in the clause are to be paid high time. It appears to us that the clause deems that the employees are subject to a direct fall when they work on trusses, stacks, towers, tanks, bosun chairs, etc. Much of the extrinsic evidence relating to the Zymaize, Federal White Cement, Stelco Lime, and Beachville Lime projects merely established that the high time premium was paid for work done on the cement platforms on the top of the silos and on towers. We are satisfied that a silo can be reasonably viewed as a large tank. Therefore, work done on those silos and towers would be eligible for the high time premium because the work was done on the specific types of structures referred to in clause 900 C.3.

17. The work on those projects that was not done on silos or tanks or towers, that is on walkways or catwalks often required electrical work to be done at the edge of the walkway

or catwalk with an employee occasionally leaning through or over the rails to perform the work. Similarly, the work done at the Domtar Mine project for which employees were paid the high time premium was done at the edge of the structure. In our opinion, the employees who worked in those situations can be reasonably characterized as being subject to a direct fall. Although they were working within the guardrails, and may have been tied off, that is, had safety ropes tied to them, there was the possibility of a fall directly off of the structure on which they were working.

18. There was also evidence that the high time premium was paid while employees worked on open platforms on the top of buildings and at the Grand Theatre, where employees were paid high time both while working on the edge of the platform and at the centre of the platform. While those examples support the interpretation suggested by the applicant, they were only two isolated examples of when the payments were made. They do not, in our view, constitute enough of a pattern of conduct to establish that a practice existed in the area where clause 900 C.3 of the provincial agreement or its predecessors was applicable so as to cause us to find that employees who worked on supporting structures or open platforms, 18 meters or more above the ground but were not themselves subject to a direct fall, that is, were not working at the edge of the platform or structure, were entitled to the high time premium.

19. Counsel for the respondent submitted that the employees were not subject to a direct fall even when they worked at the edge or through the guardrails and relied on the fact that members of the applicant who worked in building construction at the edge of the unfinished or finished floors or on formwork did not receive high time. He argued that those persons were at greater risk of direct fall than employees who worked on the modules within the guardrails. In our opinion, that evidence does not assist the respondent. The “subject to direct fall” criterion only becomes a consideration when an employee is working on equipment located on “supporting structures” or “open platforms”. Commercial or institutional buildings are not supporting structures or open platforms as those terms are used in the collective agreement. Therefore, so long as an employee is not working on a bosun chair or on a swing or rolling scaffold or similar equipment when employed in building construction, that employee is not eligible for the high time premium even if the work performed may make an employee subject to a direct fall off of the building.

20. Counsel for the respondent argued that the production modules were permanent and therefore were like buildings, only made of steel as opposed to concrete. We disagree. A supporting structure may be permanent or temporary. It is in place to support the equipment on which the electrical work needs to be performed. In our view, the production modules are supporting structures as that term is used in clause 900 C.3 of the provincial agreement. They are housed inside a building. They are not a building or part of the building. Therefore, in our opinion, any employee who worked on the production module 18 meters or more above the ground satisfied the first condition for eligibility for the high time premium.

21. The second element necessary to establish entitlement to the high time premium is being “subject to a direct fall”. In our opinion, an employee need not be in actual danger of falling 18 meters or more to be eligible for the premium. We do not interpret the high time premium clause as creating the obligation to pay the premium only when employees are working in contravention of safety regulations. Rather, the employee need only work at the edge of a structure or through or over the guardrails to be subject to a direct fall or work on the kinds of structures or equipment that are specifically enumerated in clause 900 C.3.

We interpret the term “subject to a direct fall” to mean that if an employee fell, the fall would be directly off of the structure or platform. Thus, the amount of high time premium each individual employee was entitled to receive was dependent upon the duration of time that that employee was working 18 meters or more above the ground on either the equipment or structures listed in the clause or that that employee was subject to a direct fall while working on a supporting structure or open platform.

22. We are not persuaded that the clause is to be used to classify the construction project on the which the work is being done. Rather, since the clause states “where a *workman* is subject to a direct fall . . . a premium of one quarter time above *his regular rate* will be paid and over 30 meters *he will be paid* double the regular rate of pay.” [emphasis added], the use of the singular noun “workman” and the singular pronouns “his” and “he” suggests that the payment of the premium requires individual employees to satisfy the “subject to a direct fall” criterion in the clause. Simply because one employee may be subject to a direct fall while working on a structure or platform 18 meters or more above the ground does not oblige the respondent to pay the premium to all of the employees who work on that structure or platform 18 meters or more above the ground.

23. The respondent did not pay the high time premium to employees who worked 18 meters or more above the ground at the edge of the production modules, but within the guardrail perimeter. In our opinion, employees who worked at the edge of the production modules were subject to a direct fall. That is, if the employee fell, the fall would be directly off of the structure.

24. Since the respondent did not pay the high time premium when employees worked 18 meters or more above the ground at the edge of the production modules, it violated the collective agreement. The Board therefore directs the respondent to pay its employees the high time premium for all hours worked 18 meters or more above the ground at the edges of the production module.

25. By agreement of the parties, the Board remains seized with the determination of damages if the parties are unable to agree upon the amounts payable pursuant to this decision.

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**1328-85-U Canadian Paperworkers Union, Local 304, Complainant, Sunworthy Wallcoverings a Division of Borden Company Limited, Respondent**

**Interference in Trade Unions - Unfair Labour Practice - Right to representation at time of formal discipline included in s.64 - Right only where grievor required to meet with employer for purposes of imposing discipline - Act not turning directory provision for discipline meeting into mandatory - Act not intended to provide appeal to Board from arbitration award upholding discharge - Windsor Western Hospital distinguished**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members W. H. Wightman and P. J. O'Keeffe.

**APPEARANCES:** Guy Beaulieu and Jim O'Mara for the complainant; L. Bertuzzi and K. Tracey for the respondent.

**DECISION OF THE BOARD; January 29, 1986**

1. The name of the respondent is amended to read: "Sunworthy Wallcoverings a Division of the Borden Company Limited".
2. This is a complaint under section 89 of the *Labour Relations Act* alleging violation of section 64 and 66.
3. The respondent raised a preliminary objection that the facts relied on by the complainant, even if accepted, did not constitute a *prima facie* violation of the Act. Before outlining the submissions of the parties with respect to the preliminary motion, it is necessary to sketch the factual context. The facts were not in dispute, except as noted.
4. The grievor was an employee of the respondent company. In September, 1984, the grievor received a thirty-day jail sentence. In October the grievor was discharged, by letter, for absenteeism while serving his sentence. A grievance was filed alleging that the discharge was unjust and that the discharge was a nullity because the respondent terminated the grievor without first holding a disciplinary meeting with the grievor and the union steward. The grievance proceeded through the usual steps in the internal grievance process and, then, to arbitration. In a unanimous decision, the arbitration board found that there was just cause for the discharge and the discharge was not a nullity. With respect to the latter procedural issue, the arbitration board concluded that the collective agreement provision regarding a meeting with the company, a steward and the employee prior to the imposition of discipline was directory only. Further, the arbitration board considered that, while the arbitration panel had the power to fashion a remedy for failure to comply with a directory provision (i.e., the letter of intent), there was no necessity for such a remedy in the instant case as "the evidence did not disclose any reason to anticipate that a discipline meeting, with union representation, would have been of assistance to the grievor" (at page 14 of the award dated May 24, 1985).
5. As noted earlier, the parties did not dispute the facts as found in the arbitration award dealing with the events concerning the grievor's discharge except where the award referred to the procedures followed in other grievances. Both parties did assert that there were other grievances or instances where, according to the union, the respondent had held "pre-discipline" meetings and the union dissuaded the respondent from imposing discipline and,

where, according to the respondent, discipline was imposed without any “pre-discipline” meeting. This clarifies the extent of the disagreement with the facts as found by the arbitration board and the Board notes the parties’ reservation of their right to call evidence on those other grievances if necessary. It was conceded that, whatever the collective agreement may require, the respondent has not had a consistent practice of holding pre-discipline meetings.

6. The respondent submitted that the interpretation of the collective agreement was a matter for an arbitration panel, not the Board and where, as here, an arbitration panel has interpreted the collective agreement, that interpretation was binding on the Board. As the arbitration panel had found the “pre-discipline” meeting to be a directory provision, it was argued there was no mandatory “event” to which representational rights could attach. The respondent contended that the Board could not “create” the “event” (i.e., the pre-disciplinary meeting) in the face of the arbitration panel’s ruling. Further, the respondent asserted the alleged “violation” of the letter of intent was without remedy. That is, subsequent to the termination, meetings were held in accordance with the grievance procedure and at which the union could make all the representations which could have been made prior to the imposition of discipline. The respondent distinguished the decision in *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643 on the basis that the denial of union representation in that case resulted in an arbitration hearing which dealt with the issue of a “quit” rather than the merits of the alleged unjust discharge. In the instant case, the respondent stressed the arbitration board heard the merits of the discharge itself. In summary, the respondent submitted there must be a scenario or event at which the union’s representational rights were interfered with for a *prima facie* case to be demonstrated. Here, there had been no pre-discipline meeting and the arbitration board concluded no such meeting was required. Therefore, it was argued the Board did not have the jurisdiction to create the requirement of a meeting and then to attach representational rights.

7. The union submitted the rights under the Act in the collective agreement were intertwined. It was argued the arbitration panel should have concluded the pre-discipline meeting was a mandatory provision because of the operation of the Act; *Windsor Western Hospital*, *supra*, was cited in support. That is, once the collective agreement contained a provision respecting pre-discipline meetings, that provision, notwithstanding its strength or weakness on its face, generated representational rights and becomes mandatory; non-compliance then constituted a violation of the Act as well as the collective agreement. For denial of the union’s representational rights, the union argued the appropriate remedy was reinstatement of the grievor with full compensation; or, referral to a new arbitration board with the direction the pre-discipline meeting was a mandatory provision or, at least, that provision could be used to mitigate the penalty imposed; or, the Board could fashion its own remedy for violation of the Act. The union submitted there was no point in directing a new “pre-disciplinary” meeting, in effect, repeating the internal grievance process. The union based its remedial request on the basis that the union had lost its opportunity under the Act and the collective agreement to represent the grievor prior to the imposition of discipline.

8. Given the union’s reliance on *Windsor Western Hospital*, *supra*, it is appropriate to refer to the following passage from that decision wherein the conduct of the hospital is discussed:

28. We now turn to the allegations against the Hospital. In essence it is alleged by the Association and the complainant that the Hospital interfered with the representation of an

employee within the meaning of section 64 of the Act. We start by accepting that representation within the meaning of section 64 of the Act includes the representation of employees at the time that formal discipline is imposed and during the processing of any subsequent grievance. Although this Board has never before been required to articulate the extent of the union's right in this regard, it flows naturally from the overriding purpose of the Act; that is, to redress the imbalance that exists when an individual employee is forced to deal with his employer in respect of his employment relations. The United States Supreme Court in upholding an interpretation of section 7 of the *National Labour Relations Act*, which gives employees the statutory right to union assistance in a disciplinary proceeding, observed that sound policy reasons support the finding of an independent right to union representation at such a hearing. (See *J. Weingarten Inc. and Retail Clerks, Local 455*, (1973) 485 F. 2d 1135 84 LRRM 2436 U.S.C.A. 5th circuit) *certiorari* granted (1975) 430 U.S. 251 (Sup. Ct.).) Section 7 of the *National Labour Relations Act* entitles employees "to bargain collectively ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". The U.S. Supreme Court in *Weingarten, supra*, ruled that:

... Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate and has recourse to the safeguards the Act provides to redress the perceived imbalance of economic power between labour and management.

(See also *Chapdelaine v. Emballage Domfar Lee*, 84 CLLC 14,013 (Que. L.C.) for the only Canadian authority on point, in which the Quebec Labour Court held that an employee was entitled to union representation at a disciplinary interview under the "freedom of association" article of the *Quebec Labour Code*).

29. The whole scheme of our Act is to reverse the imbalance that exists between individual employee and employer. The Act provides for the certification of trade unions to act as collective representative for all of those falling within a bargaining unit found to be appropriate for collective bargaining. It is clear on a reading of the Act as a whole that the right to collective representation encompasses not only the negotiation of the collective agreement but the representation of individual employees in pursuit of or in protection of their rights under the collective agreement. It follows that just as under the American and Quebec statutes which are designed to serve essentially the same purpose, the right to collective representation under the *Labour Relations Act* (embodied in the right accorded to all persons under section 3 of the Act to join a trade union and participate in its lawful activities and the prohibition in section 64 of the Act against interference with the representation of employees by a trade union) extends to include union representation at a meeting called by the employer to charge an employee with misconduct or to impose discipline. While the statute does not give an employee the right to choose his union representative, it does protect the right to representation and prohibits employer interference with this right. It is not for the employer to decide who will be the employee's representative at a discipline meeting or to put impediments in place that can not be reasonably justified.

30. We make the following findings of fact on the evidence before us with respect to the employer's conduct vis-a-vis the representation rights of Mrs. Mordowanec at the June 9th disciplinary meeting. We find *firstly*, that at all relevant times the Hospital knew that it would be putting before Mrs. Mordowanec the option of resigning or of being terminated. We find *secondly*, on the basis of the manner in which the meeting was conducted, that the Hospital preferred (for reasons that are self-evident) that Mrs. Mordowanec resign. We find *thirdly*, on the basis of the prior adverse reports filed with the Hospital by Mrs. DeByl-Wowchuk in respect of Mrs. Mordowanec, the request by Mrs. Mordowanec that someone other than Mrs. DeByl-Wowchuk represent her, and the silence of Mrs. DeByl-Wowchuk at the meeting, that the Hospital knew or should have known in advance of the meeting, or, at the very latest, during the meeting, that Mrs. DeByl-Wowchuk was in a conflict of interest vis-a-vis her duty to represent Mrs. Mordowanec and would not be representing her. We find, *fourthly* that, notwithstanding the requests by Mrs. Mordowanec, both before and during the meeting, to put off the meeting or adjourn it so that she could obtain advice, the Hospital refused and insisted that the meeting commence at 10:00 a.m. on June 9th and be carried to a conclusion without



adjournment. In the face of these findings of fact and in the absence of any explanation as to why the meeting could not have been put off to allow Mrs. Mordowanec to be properly represented (the Hospital chose to call no evidence), we are compelled to find that the Hospital intentionally exploited its authority over Mrs. Mordowanec to interfere with her right to be represented at the discipline hearing (as provided in the Act and under the collective agreement) and thereby breached section 64 of the Act.

9. It is true that some of the phraseology cited appears to support the union's position, i.e., "we start by accepting that representation within the meaning of section 64 of the Act includes the representation of employees at the time that formal discipline is imposed and during the processing of any subsequent grievance" (at paragraph 28). However, the following sentence clarifies the context for those representation rights, namely, that the overriding purpose of the Act is "to redress the imbalance that exists when an individual is *forced to deal with his employer* in respect of his employment relations" (emphasis added). In *Windsor Western Hospital*, the grievor was required to *attend* a disciplinary meeting without adequate union representation (in part also because of a violation of section 68 of the Act) she was faced with a choice of resign or be fired, she *requested* the opportunity to speak to a union representative who would be available that afternoon and her request was denied. In these circumstances, the hospital was able to extract a resignation letter which it later raised as a bar to an arbitration of the merits of the grievor's termination. The instant facts stand in sharp contrast. Prior to the imposition of discipline, there was no meeting whatsoever: the grievor was *not* confronted by his employer in the context of an imbalance of power, with its resulting unfairness and during the grievance procedure, the grievor *was* represented. Thus, in the Board's view, the principles regarding representation rights enunciated in *Windsor Western Hospital*, do not assist the grievor. Whether the respondent violated the collective agreement in not conducting a pre-discipline meeting is a proper matter for an arbitration board to determine. The failure to hold such a meeting, at least in circumstances where, as here, a consistent practice of holding such pre-discipline meetings was not alleged, cannot be said to have unlawfully interfered with the complainant's right to representation guaranteed by section 64.

10. In fact, the procedural issue as to whether a pre-disciplinary meeting was required was heard by the arbitration board. As noted, the panel determined the provision was directory only. The Board does not accept the union's argument that the letter of intent is "transformed" into a mandatory provision by virtue of the Act. As is clear in *Windsor Western Hospital*, the representation rights operate independently, flow from section 64 of the Act itself. That is, even apart from express language in the collective agreement regarding representation at discipline and grievance meetings, section 64 creates representation rights, denial of which may constitute a violation of the Act.

11. The Board further wishes to stress another fundamental difference between *Windsor Western Hospital* and the instant case. In *Windsor Western Hospital*, the arbitrator only heard the preliminary objection that the grievor had voluntarily resigned. The issue as to whether, on the merits, the discharge was unjust was not heard (because of the violations of section 68 and 64 by the union and the hospital respectively). In the instant situation, the same cannot be said. The grievance proceeded through the grievance process and to arbitration on the merits. The "justness" of the discharge in all the circumstances was fully argued before the arbitration board. Unfortunately for the grievor, the discharge was upheld. In the Board's view, the union is really seeking to overturn the arbitration award by coming to the Board. The statutory rights in the *Labour Relations Act*, however, are not intended to create an alternate

route to judicial review for challenging arbitration awards. Nor, in the Board's opinion, could *Windsor Western Hospital* be reasonably described to stand for such a proposition. There are, of course, circumstances in which the Board possesses jurisdiction to deal with an alleged unfair labour practice where the impugned conduct may also constitute a violation of a collective agreement. Whether the Board should defer to arbitration is determined generally by the principles enunciated in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. Even where the Board does so defer, the Board retains jurisdiction to deal with the unfair labour practice aspects, also as set out in *Valdi, supra*. In the instant facts, the grievor's loss was, at best, the loss of an opportunity to have a pre-discipline meeting with union representation. The grievor *did* receive union representation throughout the grievance procedure and a full hearing on the merits at arbitration. In the Board's view, there is not made out a *prima facie* case for the remedy requested. That is, even if a violation of section 64 representation rights was made out (and the Board has found no such violation on the facts as agreed), that violation would not lead to the remedy sought by the complainant or, as a matter of discretion, the Board would decline to exercise its discretion in these circumstances to provide the remedy sought given that the parties had the opportunity to fully argue the merits of the grievance at arbitration and did so.

12. For the foregoing reasons, the Board upholds the respondent's preliminary motion that the facts do not disclose a *prima facie* violation of the Act. The complaint, therefore, is dismissed.

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**0603-85-R** United Food & Commercial Workers, Local 206, Chartered by United Food & Commercial Workers International Union, Applicant, v. **Super Tops Holdings Inc.**, Respondent

Sale of a Business - Unprofitable Safeway Grocery Store closing down - Family-owned business already operating grocery stores obtaining sub-lease of premises and purchasing equipment and fixtures - Opening ethnic oriented grocery store after hiatus of over five months - Acquisition of assets and facilities and not sale.

**BEFORE:** Paula Knopf, Vice-Chairman, and Board Members J. Wilson and R. Wilson.

**APPEARANCES:** Paul W. Timmins, D. V. MacDonald, Jim Andress, Frank Palmer, Jim Hastings and Claude D. Ianneville for the applicant; J. Paul Wearing, Rueben Rosenblatt and Joe Chetti for the respondent; Pasquale De Luca for a group of employees.

**DECISION OF PAULA KNOPE, VICE-CHAIRMAN AND BOARD MEMBER J. WILSON;** January 10, 1986

1. This is an application under section 63 of the *Labour Relations Act*. The applicant union seeks a declaration that there has been a sale of a business by Canada Safeway Limited to the respondent at premises known municipally as 801 Mohawk Road West in Hamilton, Ontario (hereinafter referred to as the Mohawk Road location).

2. On December 20, 1985 the Board issued a "bottom line" decision in which a majority of the panel dismissed the application with the reasons for dismissal and the dissent of R. Wilson to follow. The following constitutes the reasoning of the majority with the decision of R. Wilson appended thereto.

3. The dispute is over a retail grocery business that had been operated at the Mohawk Road location by Canada Safeway Limited (Safeway) in that location for a number of years. The evidence of James Egerton, the Safeway store manager in the last year of its operation, was that their marketing strategy was not to cater to any particular "ethnic" community, but instead to be broad-based and cater to a diverse clientele. Head office of the Safeway chain dictated marketing policies and whatever changes were made in the store. In fact, many cosmetic and policy changes were attempted in the last year of the operation at Mohawk Road. However, Raymond Teal, an employee from Safeway's controller's office, testified that the Mohawk Road store had not made money since 1979. Thus, a decision was made by Safeway to close down the Mohawk Road location. The store closed on December 29, 1984. Prior to closing, signs were placed in the store's windows directing customers to Safeway's adjacent location in Stoney Creek.

4. Prior to the store closing, Safeway's real estate manager, Keith Aitkens, approached Mr. Joe Chetti, the president of the respondent company, towards the end of October or early November, 1984. The two men had had business dealings together in the past. The approach was after the decision to close the Safeway store had been made. Mr. Aitkens advised Mr. Chetti of the availability of the Mohawk Road location and solicited Mr. Chetti's interest in acquiring a sublease to that location.

5. The respondent company headed by Mr. Chetti is a family-owned business operating a number of retail grocery stores which are designed to cater to the Italian and/or the "ethnic" community. The business began in 1971 with one retail store. That store was sold after a few years. But in 1977 Mr. Chetti and his two brothers-in-law opened a store in Etobicoke with the object of serving the Italian community in that area. In 1981, a second store was opened in Brampton which served the Italian and Portuguese communities. A third store was opened in the Finch West Mall which serves a large Italian community in that area. All three of these stores continue to operate extremely successfully. In May, 1984, the respondent company made a corporate decision to expand the business but to confine the objectives of the business to serving the Italian or "ethnic" community. The principals of the respondent were interested in locating in the Hamilton area because they perceived a large Italian community which was not being adequately served by any "ethnic" grocery stores other than one by the name of "Fortino's".

6. Because of the approach from Mr. Aitkens and Super Tops' corporate desire to expand, Mr. Chetti commissioned a market research study of the Hamilton area through a professional research company, CCMD. Two reports were produced, dated January 1985 and February 7, 1985. After receiving and reviewing these studies, Mr. Chetti proceeded to complete negotiations with Mr. Aitkens in March, 1985 and a deal was entered into with Safeway on March 29, 1985. The respondent subleased the Mohawk Road location from Safeway and purchased \$70,000 worth of fixtures and equipment as part of the package for the "deal". Some of the equipment was used at the Mohawk Road location and some was taken to be stored at the respondent's warehouse with the intention that it could be used in other locations



when and if it would later be needed. Much of the store's equipment and fixtures were not sold by Safeway, i.e. signs, buggies, checkout stands and registers. This equipment was absorbed by Safeway and relocated at another of its facilities.

7. Prior to opening as a Super Tops store on Mohawk Road, the respondent undertook extensive renovations to the location. A total of approximately \$1,200,000 was spent on leasehold improvements, including redesigning the stores, displays and signs. The meat counter was expanded from 60 feet to 104 feet to enable Super Tops to have fresh cut meat and a deli counter. Specialty meats and cuts were then able to be provided such as lamb heads, rabbit, goat, veal, as well as sausages and pizza made on the premises. Little space is allowed for pre-packaged meat. Instead, customers are able to ask butchers for specific cuts and quantities. The new deli counter that was created stocks Italian meats, cheeses and olives.

8. An additional 60 feet of space was added to the produce department. The Super Tops designers called for renovations to include a canopy designed to cover the produce area to have it resemble an Italian piazza. Italian specialty fresh products are carried such as figs, snails, or lampone on a seasonal basis. In addition, unlike before, goods are sold in bulk, such as baskets of plums, tomatoes and grapes. The equipment for making tomato sauces, wines and pickling are sold with the produce.

9. Few changes were made to the aisles themselves. The changes that were made appear in the stocking of the shelves. Unlike Safeway, the Super Tops store has a wide variety of each of Italian products, such as forty different cuts of pasta from each of five different Italian companies, twelve different brands of Italian mineral waters, six fruit nectars, specialty Italian biscuits and cakes, and a very wide selection of olive oils and espresso coffees. In addition, the store carries all standard products such as milk, butter and laundry goods. But again, even with soaps, a special line of Italian soaps is imported and featured.

10. In terms of marketing, the respondent says it targets the Italian community. The respondent has retained the former N.H.L. star Phil Esposito and the anchor woman from M.T.V., Laura Albonese, for promotional work so that the store can be identified with the Italian image. Ads are carried in Italian, Portuguese and Greek on multilingual radio. Ads are also run in English on CHIN and Radio 790. Flyers are delivered on routes identified as Italian districts although they are printed in English. Ads are carried in local newspapers and the Toronto Sun. The Sun was chosen because of its high proportion of "ethnic" readership. Ads are also placed in the Italian Newspaper, *Couriere Canadiense*. The respondent's witnesses say that the ads are designed to attract the Italian shoppers in particular, and in addition, shoppers who desire Mediterranean foods. However, the ads do feature a large number of standard "non-ethnic" products frequently as "loss" leaders. Mr. Chetti says that any shoppers are encouraged to come into the store. However, he expects that the "average Canadian" shopper would be uncomfortable with the strong aroma of cheeses and meat and the sight of fresh rabbits and whole lamb carcasses or lambs' heads in the store. Thus Mr. Chetti thought that the "average Canadian shopper" would not likely return to the store even though he/she could probably satisfy the basic needs of an average family at the Super Tops store.

11. Staff are hired who can speak Italian or Portuguese, as well as English. Cash registers carry signs indicating that the staff can speak Italian or Portuguese. The staff were recruited through ads on CHIN or Radio 790 or in *Couriere Canadiense*. The purpose of this kind of advertising was to attract people who could serve Italian customers. All the store's

management is done by Mr. Chetti and his family. There is no evidence of any overlap of personnel from the original Safeway store.

12. Since the time of its opening at the Mohawk Road location at the end of May, 1975, Super Tops has made money and has become a very successful operation. Super Tops has more checkout counters than the original Safeway store had and there are often lineups at these cash registers.

13. The respondent company has a system of warehouses and transportation which serves its own stores. Thus, the Mohawk Road location is supplied through Super Tops' own system of warehouses and delivery.

14. There is no question that there have been some significant changes since Super Tops took over the Safeway location. Mr. Egerton described "dramatic changes" as he entered the store after Super Tops had opened. He described the store in detail in his evidence, explaining a number of changes. The most significant changes were the changes in the outside decor, the presence of "massive" end displays at the end of aisles and the variety of imported Italian items. Mr. Egerton said that the meat and deli department has "changed completely" in terms of size and type of products and type of service offered. His overall impression was that the store was "totally different" in merchandizing, technique and product lines. He saw no "old customers" and noticed predominantly Italian shoppers. Mr. Teal summed up the difference by saying, "It wasn't the same store we had put in there. The four walls were the same but nothing else was similar."

15. Mr. Frank Palmer testified for the union. His description of the changes was not nearly so dramatic or stark as those given by the witnesses on behalf of the respondent. However, Mr. Palmer's evidence was interesting in that he had been Safeway's produce manager till the year before the closing of the Mohawk Road location. He had continued to do his personal shopping at Mohawk Road until October, 1984 when he moved his residence. Thus, he had some familiarity with the store at the time of its closing. Mr. Palmer had also been in the store before and after Super Tops opened up. Mr. Palmer emphasized that a shopper could still continue to buy basic name brand products at Super Tops. However, Mr. Palmer did note that there was a significant expansion of produce lines and noticed "more" Italian lines than Safeway carried. It was an admitted fact that Safeway had only carried four feet of shelving space devoted to Italian goods. Mr. Palmer admits that the "atmosphere" of the store had changed in terms of decor, renovation and colours. But, as a "non-Italian" Mr. Palmer testified that he did not feel uncomfortable in the store nor did he consider the store as "an Italian store for me to go shopping in."

16. The other piece of relevant information is that Super Tops had acquired leases for two other Safeway locations in the Hamilton area within a few miles of the Mohawk Road location. The subleases and bills of sale for those locations were completed around the same time as the deal was made for the Mohawk Road location. The only evidence regarding this is that one of these stores is intended to be similar to the Mohawk Road location. Insofar as the other store is concerned, there has been no corporate decision by the respondent as to what kind of store will be opened in that location or even when or if that store will in fact be opened by Super Tops.

17. The argument of the respondent is based primarily upon reliance on the Board's

previous decision in *Keele-Wilson Supermarket Limited*, [1985] OLRB Rep. March 425. That was a case between these same parties dealing with the opening of a Super Tops store after the acquisition of a sublease from Safeway. Counsel for the respondent argues that the facts in the previous case and the facts in the case before the Board at this time are so identical that there can be no justification for a different award in this situation. In the previous case, the Board felt that there had been no sale of a business within the meaning of section 63 of the Act. Counsel for the respondent further stressed that the facts of this case indicate that an independent family business has simply expanded by taking over the idle and abandoned assets of another store after it had decided to close. Again, it was said that this did not amount to the sale of a business. Counsel also relied on the decisions in *Valencia Foods*, [1984] OLRB Rep. May 773, *Gilham Foods*, [1984] OLRB Rep. Oct. 1423 and *Queensway Food*, [1984] OLRB Rep. Feb. 358.

18. The union argued that a sale of a business had taken place within the meaning of section 63 of the Act. Counsel for the union stressed reliance on the decision in *Dutch Boy Foods*, 56 CLLC 16,051 in which the importance of location for a retail food outlet is emphasized. In addition, counsel referred us to the case of *More Groceteria*, [1980] OLRB Rep. April 486 to submit that the five-month hiatus between the closing of the Safeway store and the opening of the Super Tops store would not be enough time for shoppers to lose the habit of continuing to shop in the same area. In addition, counsel submitted that the case before this panel of the Board must be distinguished from the previous case between the parties cited above because of two factors. The first difference is that in the case at hand, Safeway had approached Mr. Chetti and offered the lease to the respondent. Secondly, the fact that Super Tops has acquired subleases for two other Safeway stores in the same general vicinity was submitted as evidence that Super Tops is in fact acquiring the business of Safeway in the Hamilton area. Thus, the Board was urged to distinguish the facts before it from the facts before the Board in the previous case between the parties (hereinafter referred to as the McDowell decision).

### The Decision

19. There is no question that the circumstances of this case are almost identical to those before the panel in the McDowell decision. The extensive evidence heard by both panels dealing with the remodeling of the store and the difference in the marketing techniques between Safeway and Super Tops appears to be almost identical. In fact, the recitation in facts in the McDowell decision could, with a few exceptions, be fitting or appropriate as the recitation of facts to deal with the case before this panel. Thus, it is impossible to deal further with the issues before this panel without referring to the previous decision and quoting the ratio of the decision in full:

19. The circumstances of this case are substantially similar to two recent "food store" cases where the Board had occasion to review in some detail the relevant legal principles (see *Queensway Foods Ltd.*, [1984] OLRB Rep. Feb. 358, and *Valencia Foods*, [1984] OLRB Rep. May 773). We see little purpose in repeating that analysis here. It suffices to say that we adopt, as our own, the reasoning in paragraphs 4 and 5 of *Queensway* and 23 to 28 in *Valencia*. We would only point out the ultimate conclusion enunciated in *Valencia*:

The lesson of the cases is that while location and premises are important elements of a retail food business, they are not themselves the business; even location and premises can be or become mere "surplus assets" which alone, or even in combination with other



assets, can lack the dynamic or organic quality which distinguishes a business from an idle collection of assets....

That single sentence highlights the issue here: has the company acquired part of Safeway's "business", or has it merely acquired the right to use certain premises, formerly used by Safeway?

20. We do not doubt the importance of location in the retail food industry - particularly since the habit of shopping locally can be an important element of good will and can be the key to business success even if good will is not expressly recognized in the transaction by which the location is acquired. There is no doubt in this case, there are indications which, when considered in the context of the retail food industry, do tend to point towards a sale of a business within the meaning of section 63. The company continues to carry on a food business from the same location as Safeway which has effectively withdrawn from that local market. The hiatus period between the closing of Safeway and the opening of Super Tops is relatively small (six weeks). The premises and general store layout are similar.

21. But there are also a number of factors which point in the other direction. Mr. Chetti had no intention of acquiring Safeway's business. Indeed, quite the contrary. He already operated two ethnically-oriented supermarkets in Metropolitan Toronto and was anxious to open a third. Safeway's business, as such, was unprofitable and not worth buying.

22. Mr. Chetti learned of the possibility of acquiring the Safeway premises from an independent real estate agent. The company did not acquire any managerial or other expertise from Safeway. The entrepreneurial initiative, managerial talent, and employee skills were all derived from Mr. Chetti's pre-existing operations or were assembled following the sale. A substantial sum was expended so that the new store would conform to Mr. Chetti's business concept rather than that of Safeway. Mr. Chetti knew that his success depended upon expanding, serving and developing his own market which was not being served by Safeway or the other local chain stores. He was able to do this with dramatic success because he was able to bring to bear his own business organization to attract customers whom Safeway never reached. That is why he was able to instantly triple the sales volume. He was not acquiring and reviving an ailing "part" of Safeway's business. He was expanding his own business from premises formerly occupied by Safeway.

23. We accept the union's submission that in the retail food business location is important, and the acquisition of physical premises will in many cases be sufficient to trigger a finding of "successorship"; moreover, when a "severed part" of the business has been transferred it would be an unusual purchaser who did not undertake any new initiatives, or try to put his own imprint upon his recent acquisition. On balance, however, we do not find a sale of a business in the facts of this case. In our view, the presence of Super Tops at Safeway's former location represents the expansion of an already well-established business in which some assets of Safeway came to be used. Those assets did not alone constitute a business or part of a business, and it cannot be said in this case that the company has expanded by purchasing a competitor's business and refurbishing it. It has merely purchased some idle and uneconomic assets which it has used to expand its own successful going concern. Section 63 has no application. This application is accordingly dismissed.

20. The only differences between the issue before this Board and that in the previous case between the same parties are the two factors mentioned by union counsel, i.e., the fact that the acquisition of the property was done through a direct contact by Safeway rather than an independent real estate agent and the fact that Super Tops also acquired two other Safeway stores at the same time. The question this panel must then ask itself is whether these two factors outweigh all the other considerations that led the previous panel to conclude that there had not been the sale of a business.

21. On the evidence before this panel, we cannot conclude that the acquisition of three

subleases at the same time in the same area alone can compel us to determine that the respondent was acquiring Safeway's business. Instead, the evidence before this panel is simply that Safeway had decided to close its business and direct its customers to other active locations. What the respondent simply did was acquire the "idle assets" of Safeway and use those locations to open ethnically-oriented supermarkets targeted to a specific group of customers and a completely different type of marketing strategy.

22. While the direct approach from Safeway to Mr. Chetti may initially appear to be an indication that Safeway was selling its business, that factor alone cannot be conclusive. In fact, on the contrary, the evidence is that Safeway had decided to close down the locations. By the time the respondent corporation had commissioned, received and reviewed its marketing studies, the Mohawk Road location had already been shut down by Safeway. Indeed, Safeway had directed its old clientele to its other locations in Stoney Creek. It was four months after the closing date that the agreement was consummated between Super Tops and Safeway and another two months later before the Super Tops store opened. This hiatus in time together with the redirection of customers by Safeway does not indicate any intent or desire to acquire Safeway's business despite the fact of the direct approach from Safeway to Super Tops. Instead, it indicates that Safeway, from previous experience, was approaching a potential prospect.

23. We agree completely with the analysis and the reasoning in the previous decision between the parties. Given the incredible similarity in facts and the identity of the parties, we can see no reason to reach a different conclusion on the facts before this panel. Indeed, there are factors in the case heard by this panel which are even more indicative of the fact that a sale of business has not occurred within the meaning of section 63 of the Act. In particular, the hiatus period between the closing of the Safeway and the opening of the Super Tops in the case at hand was over five months as compared to the six weeks in the previous case. Further, the evidence before this panel with regard to marketing and advertising is more indicative of an attempt to attract an ethnic clientele. Finally, in the previous case the Board had concluded that Super Tops had expanded an already well established business into some of the assets which Safeway had decided it no longer needed. At the time of the case before this panel, Super Tops was an even more well established business which had made the corporate decision to expand even further. While it may have acquired some of Safeway's assets, Super Tops only acquired assets which were of no value any longer to Safeway as a going concern. To quote appropriately from the previous decision, "It has merely purchased some idle and uneconomic assets which it has used to expand its own successful going concern".

24. For all these reasons, we must conclude that section 63 has no application. This application is therefore dismissed.

#### **DECISION OF BOARD MEMBER R. WILSON;**

1. I regret I cannot agree with the majority's decision. I find the facts are not substantially in dispute.

2. In its decision the majority refers to the MacDowell decision stating that the facts are almost identical. There are however differences, those being:

1. Mr. Chetti was made aware of this location by Safeway employees in the Real Estate Division, while in the previous case a third party introduced the location to Super Tops.

2. The location in this case was not the only location involved. In fact three locations were subleased all in the Hamilton Mountain Area, while the MacDowell case involved one location.

3. I am also concerned about the excessive use of the term "ethnic" with regard to the supposed change in the store operation. There was no convincing evidence of a strategy to serve only the ethnic community. In fact, we heard evidence that anyone could meet their shopping needs at this store. Newspaper ads, placed as exhibits, clearly could have been ads for any retail grocery store. There was no obvious "ethnic" foods. Newspaper ads also included the picture of NHL star Phil Esposito. When Mr. Chetti was questioned, the Board was told he was used because of his ethnic heritage not because of his popularity as an NHL star. Frankly, I find this hard to believe. Flyers which were distributed and the signs posted in stores were all printed in English. In conclusion, I find the use of the term "ethnic" to be overused and not in keeping with the nature of the clientele the store serves, or may serve in the future.

4. While there are many factors which determine the sale of a business, the most important is location with respect to a retail grocery store. This is particularly important because, although one location is the subject of this case, two others were subleased at the same time, in the same neighbourhood. Safeway has in effect withdrawn from the market area, leaving it for Super Tops.

5. The location referred to in this case was introduced to Mr. Chetti of Super Tops by an employee of Safeway.

6. The sale of chattels and equipment further indicates the purchase of a business. It matters not that Mr. Chetti needed the equipment; the fact remains he purchased it.

7. For all these reasons I would have found that Super Tops not only acquired Safeway's assets but the retail grocery business as well, and therefore conclude section 63 applies, finding in favour of the applicant.

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**2204-85-R Canadian Union of Public Employees, Applicant, v. The Toronto General Hospital, Respondent**

**Bargaining Unit - Build-Up - Certification - Practice and Procedure - Whether students included in part-time unit sought - Whether build-up justifying deferred vote direction - Interim certificate issued by agreement - Board issuing directions as to exchange of pleadings and production preceding hearing into bargaining unit dispute**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *F. C. Burnet* and *L. Collins*.

**APPEARANCES:** *Helen O'Regan*, *Lorenzo Roidi*, *Stephen D. Owens* and *Roman Schyngera* for the applicant; *Wallace Kenny*, *David Gibson* and *Elizabeth Ryan* for the respondent.

**DECISION OF THE BOARD;** January 8, 1986

1. The name of the respondent is amended to "The Toronto General Hospital".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Except with respect to the emphasized words, the parties agree that the following describes a unit of employees of the respondent appropriate for collective bargaining:

all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week *and students employed during the school vacation period*, save and except professional medical staff, graduate nursing staff, undergraduate nurses, registered nursing assistants, paramedical personnel, office and clerical staff, supervisor, foreman and assistant chief engineer.

Except for the substitution of the words "paramedical personnel" for the words "graduate pharmacists, undergraduate pharmacists, graduate dieticians, technical personnel, physiotherapists, occupational therapists", this description is a mirror image of the bargaining unit description in the parties' existing collective agreement covering full-time employees. For the purpose of clarity, the term 'paramedical' includes such classifications as occupational therapists, speech therapists, speech pathologists, physiotherapists, therapeutic and administrative dietitians, registered and non-registered pathological technologists, radiological technologists (radiography), radiological technologists (nuclear medicine), registered and non-registered respiratory technologists, registered and non-registered EEG, ECG and ophthalmology technicians, registered and non-registered ultrasound technologists, glaucoma technicians, ear-nose and throat technicians, cardiovascular technicians, electro-encephalographists, electrical shock therapists, laboratory technicians, laboratory assistants, electronic technicians, psychometrists, pharmacists, pharmacy technicians, psychologists, remedial gymnasts, medical records librarians, social workers, child care workers, nutritionists, dental health educators and bio-medical technicians. The Board notes the agreement of the parties that "paramedical personnel" also includes psychometry technicians, chiropodists, parental instructors, audiologists, research assistants, dental assistants, perfusionists, clinical instructors, medical photographers, technical assistants, entrostomol therapists, respiratory therapists, hyperbaric controllers, hyperbaric attendants and health records administrators.

5. When this application came on for hearing, the respondent took the position that “students employed during the school vacation period” do not share a sufficient community of interest with those whom the parties agree fall within the appropriate bargaining unit as to warrant their inclusion in that unit. If students do fall within the appropriate unit, the respondent took the position that the Board ought to direct a representation vote and defer taking that vote until the summer period when such students would be employed in substantial number by the respondent. The parties were unable to agree on the facts relevant to a determination of either of these issues.

6. Counsel for the respondent stated that it employs in excess of 4,000 persons. Between 700 and 800 of these are employed in the full-time “services” unit presently represented by the applicant. It employed 219 persons in the bargaining unit described above as of the application date. None of those is a student working during the school vacation period, although some may be students working part-time while they attend school. Counsel advised that if students working part-time during the school year remain at the hospital on a full-time basis during the school vacation period, these are treated as somehow falling into a special category covered by the collective agreement with respect to the full-time unit. Thus, the only “students employed during the school vacation period” who are unrepresented are those who are not otherwise employed by the respondent when the school vacation period begins. Counsel advised that between 150 and 200 such students have been employed each summer in the past, and the hospital expects to employ students in those numbers next summer. Historically, approximately 50% of those employed as students during the school vacation period are returnees from a prior summer. Students are employed during the period May through to the end of August; their numbers peak in July. They fill in in the classifications worked by employees in the full-time services unit; they report to the same supervisors and perform the normal duties of those classifications. They are not eligible for any of the benefits available to full-time employees, and receive lower wage rates than full-time employees.

7. The applicant challenges the number of students whom the respondent says can be expected to be employed (other than pursuant to the provisions of the agreement covering full-time services employees) during the school vacation period, saying it is significantly lower than 150. The parties were unable to agree on what linkages there were, if any, between the wages and benefits received by part-time workers and those received by students employed during the school vacation period. They were also unable to agree on the relationship between the matters referred to in the recital of facts of counsel for the respondent and certain grievances and settlement agreements which the applicant said had occurred under the collective agreement covering the full-time services unit with respect to the status of part-time workers and students.

8. In these circumstances, we invited counsel for the respondent to present his alternate argument: that, assuming that students fall within the unit applied for, the Board should direct a representation vote and defer the taking of that vote until the summer, when students will be employed. Apart from the assumption that students would be included in the bargaining unit, counsel was advised we would assume for the moment the truth of all the allegations of fact he had made. After hearing the submissions of counsel for the respondent with respect to this argument, we ruled orally as follows:

The respondent argues that inclusion in the unit sought by the applicant of students employed in the school vacation period is inappropriate. In

the alternative, if students are to be included, counsel argues the Board should exercise its discretion to direct a vote and to defer conduct of that vote to the summer. If the appropriate bargaining unit includes students, then assuming, without deciding, that the facts on which counsel relies are all true, we would not exercise our discretion in the manner advocated by counsel for the respondent, on a "build-up" or analogous principle: see *Filkon Food Services Limited*, [1981] OLRB Rep. Dec. 1770 and 1771.

While the propriety of including students in the unit sought remains to be determined, it is apparent that the answer to that question cannot affect the applicant's right to certification. We therefore invite the parties' submissions on:

- (a) whether the Board should grant interim certification for the otherwise agreed unit excluding, for the time being, students employed in the school vacation period and,
- (b) the manner in which determination of the bargaining unit dispute should proceed.

Counsel for both parties agreed it would be appropriate to grant interim certification, having both been advised of the level of membership support shown by evidence before the Board. The Board is satisfied that, whether or not students employed during the school vacation period are included in the bargaining unit, more than fifty-five per cent of those employed on the application date in the bargaining unit described in paragraph 4 hereof were members of the applicant on December 11, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act to be the time for ascertaining membership under section 7(1) of the Act.

9. The Board hereby certifies the applicant pursuant to section 6(2) of the Act for all employees of the respondent in the bargaining unit described in paragraph 4 hereof excluding, pending final resolution of the composition of the bargaining unit, students employed during the school vacation period.

10. After reviewing with the parties the manner in which determination of this dispute about bargaining unit composition might proceed, the Board determined that it should give directions with respect to an exchange of "pleadings" and "productions" prior to a rescheduled hearing before a panel of the Board. The Board's directions in that regard were and are as follows:

- (1) Each party shall deliver to the other and to the Board:
  - (a) a statement of the material facts on which it relies in connection with the matters in issue, set out in sufficient detail that the statement contains all that would be brought out in (and could, therefore, stand in place of) the expected evidence-in-chief of all of its witnesses at hearing;
  - (b) copies of all documents on which it relies, except:



- (i) documents too voluminous or otherwise impractical to copy;  
and
  - (ii) documents not in its possession, custody or power.
- (c) a list of all documents on which it relies which fall into either of the categories described in subparagraphs (i) and (ii) of paragraph (b) above, together with particulars of the place and reasonable times at which each document in the first category can be examined by the opposite party prior to hearing, and particulars of the person(s) in whose possession, custody or power the documents in the second category may be found.
- (2) The respondent shall deliver its statement of material fact, list of documents and copies of documents to the Board and to the applicant on or before January 24, 1986.
- (3) The applicant shall deliver its statement of material facts, list of documents and copies of documents, with respect both to the issues of fact raised by the respondent in its material and disputed by the applicant and with respect to additional issues of fact it proposes to raise, on or before February 7, 1986.
- (4) If the respondent wishes to respond at hearing to issues of fact raised in material delivered by the applicant pursuant to paragraph (3), its supplementary statement of material fact, list of documents relied upon and copies of documents relied upon with respect to any such issues must be delivered to the applicant and the Board on or before February 21, 1986.
- (5) All outstanding issues in this application shall be scheduled for hearing on the earliest available dates in March 1986, after consultation with the parties' representatives.
- (6) Neither party shall adduce evidence of facts or documents not included or specifically referred to in materials exchanged in accordance with these directions, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so on such terms and conditions as it considers advisable.

11. This panel is not seized with the issues outstanding. The matter is referred to the Registrar for relisting in accordance with paragraph (5) of the directions given orally December 21, 1985 and reproduced in the next preceding paragraph.

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**2653-84-U Barbara Veraldi, Complainant, v. United Food and Commercial Workers International Union, Respondent, v. The Great Atlantic and Pacific Co. of Canada Ltd., Intervener**

**Duty of Fair Representation - Unfair Labour Practice - Whether manner of settling previous grievance arbitrary - Whether representation duty to complainant requiring union to rescind previous settlement entered in good faith**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman.

**APPEARANCES:** *Frank M. Falconi* for the complainant; *Douglas J. Wray, W. E. Hanley* and *Jim Crockett* for the respondent; *T. A. Zakrzewski* for the intervener.

**DECISION OF THE BOARD;** January 10, 1986

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging a violation of section 68 of the Act. Section 68 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. In September of 1984 the complainant, Barbara Veraldi, filed a grievance complaining about what is termed a "back-to-back" situation in the store. The complainant is a part-time employee, and a "back-to-back" means the scheduling of two or more part-time employees over the course of a week in a way that, combined, would have made available a *full-time* job for someone. That situation is dealt with in Article 28.01 of the full-time agreement (Article 9.04 of the part-time agreement), as follows:

28.01 On the basis that recognition is given by the Union to the requirement of the Company to engage the services of part-time employees, it is mutually agreed to investigate and correct improper scheduling that may result in the use of two (2) or more part-time employees in the same job classification within a store rather than one (1) full-time employee. It being understood, however, that this shall apply only where two (2) or more part-time employees in the same job classification within a store are working a split week of approximately thirty-seven (37) hours.

3. Each week the schedule for both the full-time and part-time employees is prepared by the store manager and posted on the bulletin board. A copy is provided to the union steward as well. The collective agreement requires that all changes to the posted schedule be marked on that schedule as well, so that all employees in the store are able to see what the *actual* hours being worked are, as well as those that were originally scheduled. There are, of course, part-time employees who do not wish to work more than the part-time hours they are normally scheduled for, and the hiring of a full-time employee means less hours available for part-time employees generally. As a result, in 1982, an amendment was negotiated to Article 28.01 allowing the company the flexibility of "back-to-back" scheduling so long as there are no full-time employees on lay-off, and no part-time employees have applied for a full-time job. The collective agreement makes provision for part-time employees who *are* interested in full-time positions to file written applications to that effect with the store manager.

4. It would appear that “back-to-back” situations were becoming quite common in the North Bay store in which the complainant worked, and in March of 1984 the assistant steward, Pierrette Gohr, decided to conduct a review of the schedules. She found that there were, in fact, “back-to-backs” being employed, and, since no other part-time employee had expressed any interest or concern, she filed a grievance on her own behalf. As can be seen from the provisions of Article 28.01, once such a grievance is filed, management is obliged to check the schedules to see if the complaint is accurate, and if so, to correct the situation. This can be done either by removing the “back-to-back” problem from the schedule, or by promoting a part-time employee to full-time. In this case, as soon as Ms. Gohr’s grievance was brought to the attention of the store manager, he elected to remedy the situation by promoting Ms. Gohr to full time.

5. Ms. Gohr’s first appearance on the schedule as a full-time employee was in early May. That immediately sparked two more grievances within the part-time bargaining unit, one from Barbara Gilbert, and the other from Marg McKenzie, each one dated May the 9th, 1984. Barbara Gilbert’s grievance read:

Back to back hours. Have been in effect for some time on store scheduling.

and Marg McKenzie’s grievance read:

Back-to-back hours on schedule for some time. Prior to grievance Jr. employee was put on full-time.

The regular steward, Mark Larush, then sat down with the store manager to discuss what to do, Barbara Gilbert being senior to Marg McKenzie, and both of these individuals being senior to Pierrette Gohr. Ms. Gohr testified that, in view of her seniority, she had never really expected to maintain the full-time job for very long, and accordingly was prepared to have Barbara Gilbert replace her as the full-time employee. That was done immediately. A final settlement of Ms. Gohr’s own grievance, which was the one filed in March, was left for further discussion. That grievance was not in fact finally resolved until October of 1984, at which time she was given a payment of \$1,000.00 in lieu of any other claims.

6. There were, however, additional “back-to-back” situations in the store beyond that dealt with by the Gohr/Gilbert grievances, and that left for resolution the May 9th grievance of Marg McKenzie. That grievance was *not* resolved at the step 1 level, between the steward and the store manager, and accordingly fell to be dealt with by the business agent, John Doyle, and A & P’s district supervisor, Mr. Spadafore, at step 2. Mr. Doyle had some preliminary discussions with Mr. Spadafore about the McKenzie grievance in May, but no meeting was arranged at that time. In fact, owing to the replacement of Mr. Spadafore by Mr. Fortier, to the geographic area that both individuals are required to cover, and to the intervention of the summer vacation schedule, no meeting was held on the McKenzie grievance for a number of months. Ms. McKenzie continued to inquire about her grievance whenever Mr. Doyle came into the store, and a step 2 meeting was finally arranged for September 7, 1984. At that step 2 meeting, the company proposed to Mr. Doyle that Marg McKenzie’s grievance be resolved on the basis of Ms. McKenzie being promoted to a full-time job, and her full-time seniority date being back-dated to the date of her grievance. In return, Ms. McKenzie would give up her claim to retroactive compensation. Mr. Doyle reviewed the company’s offer with Ms. McKenzie, and Ms. McKenzie indicated her acceptance. Ms. McKenzie’s grievance was, accordingly, formally settled on that basis.



7. Marg McKenzie, however, is junior to the complainant, Barbara Veraldi, and Marg McKenzie's first appearance on the full-time schedule, pursuant to the settlement, prompted the grievance from Barbara Veraldi which is the subject matter of this complaint. Ms. Veraldi's grievance read:

Jr. employee was put on full-time before senior employee.

The basis for Ms. Veraldi's grievance, it is apparent, was the existence of not an additional full-time job, but the full-time job that had just been filled on the basis of the settlement with Marg McKenzie. Mr. Doyle accordingly found himself, as he put it, in an "awkward" situation: he knew that Barbara Veraldi was senior to Marg McKenzie and really ought to have the job; but he also knew that he had just been party to a settlement of a grievance with the company, and the basis of that settlement was to award that existing full-time vacancy to Marg McKenzie. When Ms. Veraldi's complaint came to the attention of the store manager, he asked her if she had put an application in for full-time employment. Ms. Veraldi indicated that she had not and that there were none in the store office. The store manager indicated that he would get her one. Neither the company nor Ms. McKenzie, however, were prepared to deviate from the settlement that had been worked out on Ms. McKenzie's grievance, and Mr. Doyle, after considering the matter, decided that he too must stand behind the settlement that had been made. He accordingly advised Ms. Veraldi that he was not prepared to back her on her grievance over the full-time position which had been awarded to Ms. McKenzie. Ms. Veraldi was invited by Mr. Doyle to have her grievance appealed to the next step under the collective agreement, and she did so.

8. That step under the collective agreement requires deliberation on the grievance between the business agent in Toronto responsible for the A & P collective agreement generally, Jim Crockett, and the Director of Personnel and Industrial Relations for the company, Tom Zakrzewski. At that stage the company took the position that the matter had been resolved on the basis of the McKenzie grievance, and Mr. Crockett felt that the company was correct. Like Mr. Doyle, Mr. Crockett was disturbed that the junior employee was ending up with the full-time job, but he felt that if the company were to now replace Ms. McKenzie with Ms. Veraldi, Ms. McKenzie would likely grieve, and, particularly in light of the full-time seniority date which she had been given as part of her settlement, might well succeed. Mr. Crockett was also concerned about the labour relations consequences of renegeing on a settlement that had just been worked out by Mr. Doyle with the company. He accordingly decided to uphold the step 2 disposition of Ms. Veraldi's grievance, and wrote to Ms. Veraldi to that effect. At the same time, he advised Ms. Veraldi that the union's executive board would be meeting in Toronto in April, and explained to her the procedure for appeal if she wished to have her grievance considered by that body. Ms. Veraldi indicated that she did in fact wish to do so, and Mr. Crockett posted her grievance to arbitration, in order to protect the time limits pending her appeal before the executive board.

9. It also happened that at the same time as Ms. Veraldi was grieving the full-time position being occupied by Ms. McKenzie, Ms. Veraldi herself was temporarily given full-time hours to provide some relief coverage in the store, and two other part-time employees senior to Ms. Veraldi, Ms. Pineault and Ms. Nunner, grieved against *that*. Mr. Doyle correctly viewed the grievances over full-time hours being assigned to Barbara Veraldi as being linked to the question of whether Barbara Veraldi had a proper grievance against Ms. McKenzie, and

he sent all three of the grievances then outstanding to Mr. Crockett in Toronto as a package. Having received the grievances in that form, Mr. Crockett, not surprisingly, was under the impression that all three grievances had to do with the full-time job occupied by Marg McKenzie, and advised the other two grievors as well of their right of appeal at the April executive board meeting. When the other two grievors advised Mr. Crockett that it was Barbara Veraldi's own situation, working temporary full-time hours, that they were grieving, Mr. Crockett advised them that he would be investigating that matter further with the company, and that they need not pursue any appeal to the executive board.

10. Both Ms. Pineault and Ms. Nunner attended in any event with Ms. Veraldi at the executive board meeting in Toronto. At that meeting both Mr. Crockett and Ms. Veraldi addressed the full executive body, and then the six trustees representing Ms. Veraldi's local, Local 175, retired to consider her grievance. Mr. Doyle had attended in Toronto as well, but only for the purpose of driving the three employees to the meeting. When the trustees of Local 175 reconvened, they announced that it was their decision to uphold the disposition of Ms. Veraldi's grievance made by Mr. Crockett. After that meeting, Mr. Crockett and the employees from North Bay further discussed the matter over coffee, and Mr. Crockett indicated to Ms. Veraldi, as he had on one previous occasion, that he felt that "morally" Ms. Veraldi was entitled to the job, but that Ms. McKenzie had been smarter, and under the terms of the collective agreement, was entitled to keep the full-time job.

11. The Board has no difficulty with Mr. Crockett's assessment of the situation. By the time the matter came to him, the grievance of Marg McKenzie over the full-time job then available had already been settled with the company. Whether or not Mr. Crockett was right that the terms of that settlement would ultimately give her a higher legal right than Ms. Veraldi, the legal situation was certainly not sufficiently free from doubt that anyone could say that Mr. Crockett was acting arbitrarily, discriminatorily, or in bad faith in his assessment. And, apart from obvious estoppel problems, it is clear as well that a bargaining agent, having, as here, just entered into a good-faith settlement of a matter with the company, is not acting improperly in taking into account the preservation of its credibility with the company, which is essential to the bargaining unit as a whole. See, e.g. *Antonio Melillo*, [1976] OLRB Rep. Oct. 613, and the authorities cited therein.

12. The real question here is whether Mr. Doyle, in settling the grievance of Marg McKenzie as he did, acted in a manner that violated the standards of the duty prescribed in section 68 of the statute. Clearly, had Mr. Doyle consulted each of the more senior part-time employees on the seniority list prior to settling the grievance of Marg McKenzie, the present situation would never have happened. The issue, therefore, is whether Mr. Doyle was under a duty, under the terms of the statute, to do that.

13. Mr. Phil Smith has been a steward in A & P's North Bay stores for some 13 years, and testified on behalf of the complainant. His evidence was that "most" grievances are settled by seniority, and that the company and union have a policy that, e.g., the fifth person in the seniority list might write the grievance, but the top person gets the settlement. Mr. Doyle, on the other hand, had been business agent for the northern area for the past 14 years, up to the point of his retirement in 1985. He testified that "back-to-backs" exist in any store that he goes into, and that he deals with the matter on the basis of who has chosen to grieve. He testified that, in his experience, anytime someone grieves in one of these stores, the other employees all know about it, and if the more senior people do not grieve as well, he takes

that as an indication of no interest. Mr. Doyle testified that the seniority list is posted in each store so that the employees themselves can police it, and he does not himself look at it each time he comes into a store to handle a grievance. In all, Mr. Doyle's area of responsibility covered some 40 stores across northern and central Ontario.

14. While the Board accepts the evidence of Mr. Smith, it was general in nature, and does not cause the Board to believe that Mr. Doyle dealt with the grievance of Marg McKenzie in a manner different from the way in which he, at his level, has handled any similar grievance. With respect to the store in question, Mr. Smith has not worked in Ms. Veraldi's store for some years, and Ms. Veraldi testified that no employees, prior to these events, had been promoted from part-time to full-time for a period of some 8 years at least. In the case of the short-lived promotion of Pierrette Gohr, that method of correcting the problem on the schedule was adopted by the company at its own election, and no one at the level of Mr. Doyle became involved in any "settlement" discussions. Ms. Gohr herself was a steward, and had not anticipated trying to hold onto the full-time job in the face of subsequent complaints by more senior employees. Rather, she was prepared to accept instead a cash settlement of the claims arising from her own grievance.

15. The standard of review to be applied by the Board under section 68 has been set out in a variety of earlier cases. In the first of these cases, *Ford Motor Company*, [1973] OLRB Rep. Oct. 519, the Board wrote:

40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.

And similarly, in *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001:

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" - bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute...

16. In the present case, we accept the evidence of Mr. Doyle that in his experience, the existence of a grievance tends to be common knowledge amongst the employees in a store, and that that is the assumption on which he honestly acted. And it is equally clear that no effort was made by anyone to conceal from the complainant or any other employee the fact that Marg McKenzie had an ongoing grievance in the store. We have no doubt, therefore, that Mr. Doyle was acting in good faith and without discrimination throughout.



17. Nor, in the circumstances, do we find Mr. Doyle's failure to "cast about" for other grievances, as he put it, prior to settling Ms. McKenzie's grievance, to be so flagrantly deficient as to constitute a violation of the statute, particularly given the fact that many employees work part-time hours by choice, and are not interested in full-time employment. The subject of "back-to-backs" in the store had come to the forefront of general discussion as early as May of 1984. The complainant, Ms. Veraldi, had put no application for full-time employment in, nor did she file a grievance. Her failure to do the latter undoubtedly flowed from her honest perception that the back-to-back situation in existence as of May was "cleared up" by the appointment of Barbara Gilbert to full-time. But she made no inquiries or investigation with respect to that, and, in point of fact, her perception was wrong. Ms. McKenzie, on the other hand, felt a "back-to-back" continued to exist, and pressed Mr. Doyle about her grievance throughout the summer. As a result, Mr. Doyle in good faith proceeded to negotiate a final and binding settlement of Ms. McKenzie's grievance for the one "back-to-back" vacancy remaining at that time and, as noted earlier, the Board finds no violation of section 68 in the respondent's refusal to renege on that settlement thereafter.

18. The complaint accordingly must be dismissed.

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**1949-85-R Beryl Watts, Applicant, v. Canadian Union of Operating Engineers & General Workers Union Local 101, Respondent, v. Yonge-Eglinton Centre Management Services, Intervener**

**Petition - Termination - Applicant collecting separate petitions from each of 44 employees - Arranging and copying 44 sheets into single document and mailing originals to union - Board accepting single document filed where union not refuting existence of 44 separate petitions**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *R. J. Gallivan* and *C. A. Ballentine*.

**APPEARANCES:** *Beryl A. Watts* on her own behalf; *Robert Sleva* and *Claude Duchesneau* for the respondent; *Mark Contini* and *John Croutch* for the intervener.

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN AND BOARD MEMBER R. J. GALLIVAN; January 20, 1986**

1. The style of cause of this application is amended to show Beryl Watts as the applicant.

2. This is an application under section 57 of the *Labour Relations Act* for a declaration terminating bargaining rights.

3. The respondent trade union is currently the bargaining agent for the following unit of employees, namely:

All employees of Yonge-Eglinton Centre Management Services in the Municipality of Metropolitan Toronto save and except supervisors and superintendents, persons above the rank of supervisor and superintendent, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

4. The parties agree that the applicant, Mrs. Beryl Watts, is an employee in the bargaining unit. They also agree that this is a timely application.

5. In support of her application, Mrs. Watts filed what appeared to be a photostated copy of a statement in the form of a "petition". The document is headed up

"I the undersigned wish to have the General Workers Union decertified"

There then follows the signatures of 44 individuals. In testifying before the Board, Mrs. Watts stated that there had not in fact been an original document in the form of a petition signed by a number of individuals. Rather, the individuals in question had each signed a separate sheet of paper which contained the heading quoted above, one signature per sheet. Mrs. Watts testified that she had then arranged and copied the separate sheets of paper so as to produce a single document. Mrs. Watts testified that she no longer had the original sheets of paper in her possession because she had forwarded them to the head office of the respondent trade union. No evidence was led by the trade union to refute Mrs. Watts' claim.

6. Normally the Board would not be prepared to accept a document purporting to express employee wishes where the document filed with the Board is not, in fact, the document actually signed by employees. However, the oral evidence in the instant case is that individuals in question each signed a separate sheet expressing a desire to have the bargaining rights of the trade union terminated, and that these documents are now in the possession of the trade union. The trade union was in a particularly unique situation to rebut that evidence if it were not true, but did not do so. This being the case, we are satisfied that the individuals whose signatures appear on the statement filed with the Board did in fact express a desire to have the union's bargaining rights terminated.

7. On the date of the filing of the application there were 53 employees in the bargaining unit. The signatures of 32 of these employees appear on the document filed in support of the application.

8. Mrs. Watts testified that she approached all but at most four of the individuals who signed a sheet in opposition to the union. Another employee by the name of Dorothy Wood approached the other individuals. Ms. Wood did not testify at the hearing concerning the circumstances under which the persons she approached had signed in opposition to the union. In these circumstances, we are unable to conclude that the application has the voluntary support of the employees who signed at Ms. Wood's request. Nevertheless, we do have evidence concerning the circumstances under which the other employees signed.

9. Mrs. Watts testified that she prepared all of the documents signed by the employees, and apart from the employees approached by Ms. Wood, she alone approached employees to obtain their signatures. According to Mrs. Watts she collected the signatures at work, primarily when employees were on their breaks. She testified that she collected the signatures as privately

as possible, and was positive that no supervisor had been about when employees signed. Mrs. Watts further testified that at no point had she discussed her activities with members of management. The union led no evidence to rebut or contradict the evidence given by Mrs. Watts. In light of the evidence given by Mrs. Watts, we are satisfied that those who signed a statement in opposition to the trade union when approached by Mrs. Watts to do so, did so voluntarily.

10. Having regard to the above, the Board is satisfied that not less than 45 per cent of the employees in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of November 19, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of making such determination.

11. A vote will be taken among employees in the bargaining unit. Those eligible to vote are all employees in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

12. Voters will be asked to indicate whether or not they desire to be represented by Canadian Union of Operating Engineers & General Workers Union Local 101 in their employment relations with Yonge-Eglinton Centre Management Services.

13. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER C. A. BALLENTINE;**

1. I dissent from the majority decision for two reasons.

2. Firstly, I believe the petition in the form it was submitted should be rejected. It is established Board practice that statements of desire must be in *written* documentary form. The onus of producing this documentation and of satisfying the Board of its voluntariness is clearly on the applicant. As the majority notes in paragraph 6, the Board does not normally accept a document other than the one actually signed by employees. Having conceded that, the majority relies on *oral* testimony to cast on the union an onus that it otherwise does not and should not have. It is my position that it is the applicant's responsibility to produce the documentation required to support the application. Having failed to do so, the application should have been dismissed.

3. Mrs. Watts, the person who organized the petition against the union, through her own evidence appeared to have a free and unrestricted hand to circulate separate documents on company property. She indiscriminately handed out the separate sheets of paper to anyone and everyone, resulting in 44 individuals signing the document, 12 of which were not in the bargaining unit. It is very difficult for me to believe that management would not have been aware of Mrs. Watts' activities. Even if management actually did not become aware, it is a great probability that the employees would have a perception that management was either supporting this petition, or would become aware of who signed and who did not sign the petition. In the circumstances, the Board cannot be satisfied that the expressions made in the petition were made voluntarily.



4. The union in this case advised the Board it was interested and desirous of continuing to be the bargaining agent of the employees in the bargaining unit, but it would need the assistance of first contact arbitration legislation to obtain a satisfactory first agreement for these employees. It has been anxiously awaiting passage of such legislation.

5. In all these circumstances, for the reasons stated above, I would have rejected the petition and would not have placed the union's bargaining rights in jeopardy.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1985

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**0464-84-R:** The Canadian Union of Public Employees, (Applicant) v. The Association of Community Centres of the City of Toronto, the City of Toronto, Cecil Street Community Centre, Central Eglinton Community Centre, Cowan Avenue Firehall, Scadding Court Community Centre, Ralph Thornton Community Centre, The 519 Church Street Community Centre, Community Centre 55, and Applegrove Community Complex, (Respondents).

Unit #1: "all employees of the Corporation of the City of Toronto at Central Eglinton Community Centre regularly employed for not more than twenty-four hours per week, save and except the executive director and persons above the rank of executive director, program co-ordinator, secretary to the executive director and program co-ordinator, students employed during the school vacation period and special project workers funded by special time-limited grants provided to the employer which regulate the salaries and benefits of the special project workers." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #3: "all employees of the Corporation of the City of Toronto at Cecil Street Community Centre, save and except the administrator, persons above the rank of administrator, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and special project workers funded by special time-limited grants provided to the employer which regulate the salaries and benefits of the special project workers." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #4: "all employees of the Corporation of the City of Toronto at Cowan Avenue Firehall Community Centre, save and except the executive director and persons above the rank of executive director, the administrative assistant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and special project workers funded by special time-limited grants provided to the employer which regulate the salaries and benefits of the special project workers." (*Having regard to the agreement of the parties*). (*Clarity Note*). (11 employees in unit).

Unit #5: "all employees of the Corporation of the City of Toronto at Scadding Court Community Centre, save and except the executive director and persons above the rank of executive director, financial administrator and office manager, program director, facility co-ordinator, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and special project workers funded by special time-limited grants provided to the employer which regulate the salaries and benefits of the special project workers." (30 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #6: "all employees of the Corporation of the City of Toronto at The 519 Church Street Community Centre, save and except the executive director and persons above the rank of executive director, program co-ordinator, office co-ordinator, business manager, students employed during the school vacation period and special project workers funded by the special time-limited grants provided to the employer which regulate the salaries and benefits of the special project workers." (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2973-84-R:** Local 47 Sheet Metal Workers' International Association, (Applicant) v. Babco Plumbing Services Limited, Babco Heating and Air Conditioning Division, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

**0580-85-R:** United Steelworkers of America, (Applicant) v. Laurent Lamoureux Co. Ltd. (Respondent).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #3: "all employees of the Respondent at Hawkesbury working not more than twenty-four (24) hours per week save and except Store Manager and persons above the rank of Store Manager and office staff." (35 employees in unit). (*Having regard to the agreement of the parties*).

**1310-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. 426979 Ontario Ltd. — carrying on business as Espanola I.G.A., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Espanola, save and except grocery manager, meat manager, produce manager, head cashier, assistant store manager and persons above the rank of assistant store manager and office staff." (58 employees in unit). (*Having regard to the agreement of the parties*).

**1560-85-R:** United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Prestige Office Interiors Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of Metropolitan Toronto, save and except managers, persons above the rank of manager, office, sales and technical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit). (*Having regard to the agreement of the parties*).

**1575-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Bruno's Contracting (Thunder Bay) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (32 employees in unit).

Unit #2: "all employees of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar



equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (32 employees in unit).

Unit #3: “all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (46 employees in unit).

**1589-85-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. 601492 Ontario Limited c.o.b. as Hunting Wood Manors and Kafter Holdings Inc., c.o.b. as Hunting Wood Homes, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman. (2 employees in unit). (*Having regard to the agreement of the parties*).

**1602-85-R:** Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Westway Transport Limited, (Respondent).

Unit: “all employees, including dependent contractors, of the respondent in Concord save and except dispatchers, persons above the rank of dispatcher, and office and clerical staff.” (24 employees in unit). (*Having regard to the agreement of the parties*).

**1607-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Harnden & King Construction Ltd., (Respondent).

Unit: “all employees of the respondent working at Bullied quarry in Chandos Township, Peterborough County, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**1637-85-R:** The Association of Allied Health Professionals: Ontario, (Applicant) v. The Religious Hospitaliers of St. Joseph of the Hotel Dieu, Kingston, (Respondent) v. Ontario Public Service Employees Union, (Intervener) v. Group of Employees, (Objectors).

Unit: “all paramedical employees of the respondent in the City of Kingston, and in the City of Brockville, save and except supervisors, person above the rank of supervisor, interns, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 2, 1985.” (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1638-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Bandiera & Associates Inc., (Respondent).

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and employees in bargaining units for which any trade held bargaining rights on October 2, 1985.” (10 employees in unit). (*Having regard to the agreement of the parties*).

**1835-85-R:**Ontario Nurses Association, (Applicant) v. West Central Community Health Centres of Toronto, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Metropolitan Toronto." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1932-85-R:**Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. GESCO Industries Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Clairville Carpet Mills Division in the Municipality of Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman, forelady, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (48 employees in unit). (*Having regard to the agreement of the parties*).

**1938-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Plastics EMI Shielding Incorporated, (Respondent).

Unit: "all employees of the respondent in the Town of Newcastle, save and except supervisors, persons above the rank of supervisor, office and sales staff." (68 employees in unit). (*Having regard to the agreement of the parties*).

**1967-85-R:**Service Employees International Union Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Hurley Brothers Ltd., (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees working at 160 Bloor Street East, in the City of Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1979-85-R:**Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Weston Bakeries Limited, (Respondent).

Unit: "all employees of the respondent in Lindsay, save and except supervisors, those above the rank of supervisor, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

**1981-85-R:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Oshawa Group Ltd., (Respondent).

Unit #1: "all employees of the respondent at 324 Highland Road West, Kitchener, save and except assistant store manager, persons above the rank of assistant store manager, pharmacists, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at 324 Highland Road West, Kitchener employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant store manager, persons above the rank of assistant store manager and pharmacists." (6 employees in unit). (*Having regard to the agreement of the parties*).

**1990-85-R:**Ontario Public Service Employees Union, (Applicant) v. Lakehead Association for the Mentally Retarded, (Respondent).

Unit: “all employees of the respondent at Thunder Bay, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff.” (74 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2010-85-R:** Ontario Secondary School Teachers Federation, (Applicant) v. The Norfolk Board of Education, (Respondent).

Unit: “all occasional teachers, as defined in section 1(1)31 of the *Education Act*, employed by the respondent in the Regional Municipality of Haldimand-Norfolk, save and except employees in bargaining units for which any trade union held bargaining rights as of November 8, 1985.” (66 employees in units). (*Having regard to the agreement of the parties*).

**2012-85-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Renzo Cosolo Plumbing & Heating Limited, (Respondent).

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

**2048-85-R:** Canadian Union of Public Employees, (Applicant) v. Lennox and Addington County Board of Education, (Respondent).

Unit: “all employees of the respondent in the County of Lennox and Addington, save and except foremen, persons above the rank of foreman, speech therapist, attendance counsellors, assistant to special services co-ordinator, supervisor of payroll/accounting, secretary to director of education, secretary to superintendent of schools, secretary to business administrator, secretary to manager of personnel and transportation, secretary to manager of plant and purchasing, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of November 12, 1985.” (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2049-85-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 106, (Respondent).

Unit: “all employees of the respondent at 15 La Rose Avenue in Metropolitan Toronto engaged in cleaning and maintenance, including resident superintendents, save and except property manager and persons above the rank of property manager.” (6 employees in unit). (*Having regard to the agreement of the parties*).

**2057-85-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. VS Services Ltd., (Respondent).

Unit: “all employees of the respondent in its Vending Division at Brockville, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff.” (6 employees in unit). (*Having regard to the agreement of the parties*).



**2072-85-R:**United Steelworkers of America, (Applicant) v. Burrowes Manufacturing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

**2076-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Doctor J. O. Ruddy General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Whitby, Ontario, save and except professional medical staff, graduate nursing staff, nurse managers, persons above the rank of nurse manager, discharge planner, co-ordinators, persons employed in paramedical functions, security guards, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (143 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #3: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #4: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #5: (See: *Applications for Certification Dismissed - No Vote Conducted*).

Unit #6: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**2077-85-R:**International Union of Operating Engineers, Local 793, (Applicant) v. Mega Concrete Forms Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman. (3 employees in unit).

**2108-85-R:**Canadian Union of Postal Workers, (Applicant) v. Canada's Capital Building Services Limited, (Respondent).

Unit: "all employees of the respondent at 969 Eastern Avenue, Toronto, save and except supervisors and persons above the rank of supervisor." (34 employees in unit). (*Having regard to the agreement of the parties*).

**2123-85-R:**Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Libera Transportation Inc., (Respondent).

Unit: "all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (10 employees in unit). (*Having regard to the agreement of the parties*).

**2130-85-R:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Stahlin Industries Limited, (Respondent).

Unit:“all employees of the respondent in Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (30 employees in unit). (*Having regard to the agreement of the parties*).

**2131-85-R:**London and District Building Service Workers’ Union, (Applicant) v. Maplewood Nursing Home Limited, (Respondent).

Unit:“all employees of the respondent in Tillsonburg, save and except supervisors, persons above the rank of supervisor, registered nurses, graduate nurses, undergraduate nurses, director of resident care and office and clerical staff.” (56 employees in unit). (*Having regard to the agreement of the parties*).

**2132-85-R:**Labourers’ International Union of North America, Local 527, (Applicant) v. Loremar Structures Inc., (Respondent).

Unit #1:“all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2:“all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

**2134-85-R:**Canadian Union of Public Employees, (Applicant) v. Whitby Ambulance Service, (Respondent).

Unit:“all employees of the respondent in Whitby, save and except owner/operators and persons regularly employed for not more than twenty-four (24) hours per week.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2135-85-R:**Canadian Union of Public Employees, (Applicant) v. Whitby Ambulance Service, (Respondent).

Unit:“all employees of the respondent regularly employed for not more than twenty-four hours per week in Whitby, save and except owner/operators.” (5 employees in unit). (*Having regard to the agreement of the parties*).

**2151-85-R:**Retail, Wholesale & Department Store Union, (Applicant) v. Eplett Dairies Company Limited, (Respondent).

Unit:“all employees of the respondent of Grand Bend, save and except supervisors, office staff, sales staff, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

**2155-85-R:**Ontario Public Service Employees Union, (Applicant) v. Sarnia General Hospital, (Respondent).

Unit #1:“all paramedical employees of the respondent at Sarnia, Ontario, save and except supervisors, those above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees for which any trade union held

bargaining rights as of November 27, 1985.” (115 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all paramedical employees of the respondent at Sarnia, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees for which any trade union held bargaining rights as of November 27, 1985.” (115 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2166-85-R:** Christian Labour Association of Canada, (Applicant) v. Maplehurst Hospital Limited, (Respondent).

Unit: “all registered nurses of the respondent at Thorold, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff.” (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2175-85-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Veltri Stamping Corporation, (Respondent), v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at the Township of Sandwich South, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (42 employees in unit). (*Having regard to the agreement of the parties*).

**2206-85-R:** Christian Labour Association of Canada, (Applicant) v. Peter Nursing Home Ltd., (Respondent).

Unit: “all employees of the Respondent in the Township of Orford, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (9 employees in unit). (*Having regard to the agreement of the parties*).

**2216-85-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Heuga Canada Ltd., (Respondent).

Unit: “all employees of the respondent in Cornwall, save and except foremen, persons above the rank of foreman, laboratory technician, office and sales staff.” (17 employees in unit). (*Having regard to the agreement of the parties*).

**2236-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Kawartha Grader Rentals Limited, (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman. (5 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).



**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1621-85-R:**Canadian Union of Operating Engineers and General Workers, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent).

Unit:“all employees of the respondent in the city of Ottawa employed as attendants, maintenance employees, and mechanics, save and except supervisors and those above the rank of supervisor.” (17 employees in unit).

Number of names of persons on list as originally prepared by employer	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	6
Ballots segregated and not counted	1

**1731-85-R:**Sunnybrook Hospital Employees Union, Local 777, (Applicant) v. Sunnybrook Hospital, (Respondent).

Unit:“all office and clerical employees of the Sunnybrook Hospital at Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed as office and clerical employees during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to: executive director, assistant executive directors, personnel director and associate Dean of Medicine.” (80 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	4

**Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**0580-85-R:**United Steelworkers of America, (Applicant) v. Laurent Lamoureux Co. Ltd., (Respondent).

Unit #1:“all office employees of the respondent at Hawkesbury, save and except Store Manager and persons above the rank of Store Manager.” (35 employees in unit).

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Ballots segregated and not counted	1

Unit #2: (See: *Bargaining Agents Dismissed Subsequent to a Post-hearing Vote*).

Unit #3: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1468-85-R:**The Canadian Red Cross Blood Transfusion Service Employees Association, (Applicant) v. The Canadian Red Cross Society, (Respondent).

Unit:“all non-professional part-time, casual and temporary employees (support staff) of the respondent working at or out of the Toronto Blood Transfusion Centre, the Hamilton Blood Transfusion Centre, the Ottawa Blood Transfusion Centre and the London Blood Transfusion Centre employed as Clinic Assistants, Clerical Staff, Transport Staff, Laboratory helpers and Utility Persons, save and except transport Supervisors, Assistant Transport Supervisors, Centre Secretaries, and persons employed above these ranks.” (50 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters list	58
Number of persons who cast ballots	58

Number of ballots marked in favour of applicant	49
Number of ballots marked against applicant	9

**1877-85-R:**United Steelworkers of America, (Applicant) v. OE Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Markham, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period." (155 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	155
Number of names of persons on revised voters' list	154
Number of persons who cast ballots	150
Number of ballots marked in favour of applicant	82
Number of ballots marked against applicant	68

### Applications for Certification Dismissed - No Vote Conducted

**0464-84-R:**The Canadian Union of Public Employees, (Applicant) v. The Association of Community Centres of the City of Toronto, the City of Toronto, Cecil Street Community Centre, Central Eglinton Community Centre, Cowan Avenue Firehall, Scadding Court Community Centre, Ralph Thornton Community Centre, The 519 Church Street Community Centre, Community Centre 55, and Applegrove Community Complex, (Respondents). (12 employees in unit).

Unit #1: (*See: Bargaining Agents Certified - No Vote Conducted*).

Unit #3: (*See: Bargaining Agents Certified - No Vote Conducted*).

Unit #4: (*See: Bargaining Agents Certified - No Vote Conducted*).

Unit #5: (*See: Bargaining Agents Certified - No Vote Conducted*).

Unit #6: (*See: Bargaining Agents Certified - No Vote Conducted*).

**2776-84-R:**United Food and Commercial Workers Union, Local 409, (Applicant) v. Hudson's Bay Company, (Respondent). (14 employees in unit).

**0732-85-R:**Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1107; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Swing Stage Limited, (Respondent) v. Operative Plasterers' and Cement Masons' International Association Local 172, (Intervener). (7 employees in unit).

**1544-85-R:**United Steelworkers of America, (Applicant) v. C. H. Heist (Canada) Ltd., (Respondent) v. Ontario Council of the International Brotherhood of Painters and Allied Trades, (Intervener). (16 employees in unit).

**1874-85-R:**Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Sears Canada Inc., (Respondent) v. Group of Employees, (Objectors). (237 employees in unit).

**1937-85-R:**Ontario Public Service Employees Union, (Applicant) v. Mount Sinai Hospital, (Respondent). (83 employees in unit).

**1998-85-R:**Canadian Paperworkers Union, (Applicant) v. Carlton Cards Limited, (Respondent). (377 employees in unit).

**2076-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Doctor J. O. Ruddy General Hospital, (Respondent) v. Group of Employees, (Objectors). (143 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

**2177-85-R:**International Union of Operating Engineers, Local 796, (Applicant) v. The Ottawa Young Men's and Young Women's Christian Association, (Respondent). (27 employees in unit).

**2190-85-R:**Labourers International Union of North America, Local 1036, (Applicant) v. Stone and Webster Canada Ltd., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener). (13 employees in unit).

## Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**1795-85-R:**Canadian Paperworkers Union, (Applicant) v. Rustcraft Canada Inc., (Respondent).

Unit: "all office and clerical staff of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales staff, secretary to the President, secretary to the Vice-President finance, personnel department staff, persons employed for not more than (24) twenty-four hours per week, and students employed during the school vacation period." (67 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	51
Number of persons who cast ballots	50
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	32

**1848-85-R:**Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351, (Applicant) v. The Westin Hotel, (Respondent).

Unit: "all employees of the respondent in the Municipality of Ottawa and Carleton, save and except assistant supervisors and persons above the rank of assistant supervisor, persons employed as security staff, office and sales staff, front desk staff, concierge, bell captain, persons employed in maitre'd, head greeter, lead captain, captain, lead banquet bartender, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of October 23, 1985." (346 employees in unit).

Number of names of persons on revised voters' list	353
Number of persons who cast ballots	301
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	104
Number of ballots marked against applicant	192
Ballots segregated and not counted	2

**1955-85-R:**Christian Labour Association of Canada, (Applicant) v. Dresden Industrial Company (Canada) Limited, (Respondent) v. United Food and Commercial Workers International Union Local 233F, (Intervener).

Unit: "all employees of Dresden Industrial Company (Canada) Limited at Dresden, save and except foremen, persons above the rank of foreman, office staff and outside sales staff." (37 employees in unit).

Number of names of persons on revised voters' list	37
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Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		15
Number of ballots marked in favour of intervener		18

**1959-85-R:**United Electrical, Radio and Machine Workers of Canada, (Applicant) v. Black & Decker Canada Inc., (Respondent).

Unit: "all employees of the respondent in the City of Brockville, save and except supervisors, those above the rank of supervisor, office and sales staff, security guards, draftsmen and engineers." (531 employees in unit).

Number of names of persons on revised voters' list		523
Number of persons who cast ballots	511	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		119
Number of ballots marked against applicant		390
Ballots segregated and not counted		1

**2009-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. JWS Manufacturing Inc., (Respondent).

Unit: "all employees of the respondent at 771 Warden Ave., Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students involved in co-operative training programs." (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots	55	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		40

## Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**0580-85-R:**United Steelworkers of America, (Applicant) v. Laurent Lamoureux Co. Ltd., (Respondent).

Unit #1: (See: *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

Unit #2: "all employees of the respondent at Hawkesbury, save and except Store Manager and persons above the rank of Store Manager, office staff and persons regularly employed for not more than twenty-four (24) hours per week." (35 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		21
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		11
Ballots segregated and not counted		7

Unit #3: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1289-85-R:**The International Brotherhood of Painters & Allied Trades, Local 1824, (Applicant) v. 531642 Ontario Inc. carrying on business as Barber Glass Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers

and glaziers' apprentices in the employ of the respondent in all other sectors in the County of Wellington, save and except non-working foremen." (16 employees in unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		3

Unit #2:"all employees of the respondent in Guelph, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		6

**1816-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Missionary Sisters of the Precious Blood, (Respondent).

Unit:"all employees of the respondent in Richmond Hill, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		28
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		16
Ballots segregated and not counted		2

**1852-85-R:**International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Van-Rob Stampings Inc., (Respondent).

Unit:"all employees of the respondent in Metropolitan Toronto, save and except foremen, and persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (58 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		57
Number of persons who cast ballots	57	
Number of ballots marked in favour of applicant		21
Number of ballots marked against applicant		36

**1885-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Canada Dry Limited, (Respondent), v. Group of employees, (Objectors).

Unit:"all employees of the respondent at Grimsby, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		27
Number of persons who cast ballots	27	
Number of persons marked in favour of applicant		8
Number of ballots marked against applicant		18
Ballots segregated and not counted		1

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**0567-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. C. S. Yachts Ltd., (Respondent).

**0583-85-R:**The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 593, (Applicant) v. Fos-Tur Pipelines Incorporated Les pipelines Fos-Tur Incorporated, (Respondent).

**1500-85-R:**London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. Kitchener-Waterloo Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

**1684-85-R:**Labourers' International Union of North America, Local 183, (Applicant) v. Geranium Enterprises Limited, carrying on business under the name and style of Geranium Homes, Bramwich Investments Limited, Wild Stream Developments Limited, Mitz Developments Incorporated, 463308 Ontario Limited carrying on business under the registered name and style of Glen Oaks Developments, (Respondents).

**2011-85-R:**Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. City Express, (Respondent).

**2014-85-R:**International Association of Machinists and Aerospace Workers, (Applicant) v. CP Hotels, Chateau Flight Kitchen Lester B. Pearson International Airport, Toronto, (Respondent).

**2029-85-R:**Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Old Mill Restaurant (Old Mill Investments), (Respondent).

**2094-85-R:**The Canadian Union of Public Employees, (Applicant) v. The Cochrane-Iroquois Falls District R.C.S.S. Board, (Respondent).

**2105-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. TIJE Limited, (Respondent).

**2133-85-R:**Sheet Metal Workers' International Association, (Applicant) v. Canadian Air Conditioning, (Respondent).

**2189-85-R:**International Ladies' Garment Workers' Union, (Applicant) v. New Heights Manufacturing Ltd., (Respondent).

**2199-85-R:**Ontario English Catholic Teachers' Association Secretariat Association, (Applicant) v. Ontario English Catholic Teachers' Association, (Respondent).

**2221-85-R:**Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Board of Management of the Guild, (Respondent) v. Group of Employees, (Objectors).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**0726-84-R:**Food and Service Workers of Canada, (Applicant) v. Federated Building Maintenance Company Limited and Olympia & York Developments Limited, (Respondents). (*Dismissed*).



**0626-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Aristocraft Drywall Ltd. and Advance Drywall Limited, (Respondent). (*Withdrawn*).

**0678-85-R:**Labourers' International Union of North America, Local 1059, (Applicant) v. 340480 Ontario Limited, c.o.b. as Concrete Forming (1980) and Concrete Forming (London) Limited, (Respondents). (*Granted*).

**1446-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. CAS Carpentry Company Limited and Northcourse Carpentry Construction Ltd., (Respondents). (*Granted*).

**1751-85-R:**Labourers International Union of North America, Local 183, (Applicant) v. D. & R. Ventura General Construction Limited Domtar Construction Ltd., (Respondents). (*Granted*).

**2004-85-R:**Energy and Chemical Workers Union, Local 424, (Applicant) v. St. Mary's Cement Ltd., Pre-Con Company and Canada Building Material Company, (Respondents). (*Withdrawn*).

**2215-85-R:**Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pic River Forest Products Inc.; Agassiz Transport Inc.; Buchanan Forest Products Ltd. Ronald LeBlanc and Danny Barrett, (Respondents). (*Withdrawn*).

**3438-85-R:**Sheet Metal workers International Association Local 537, (Applicant) v. Gerhard Andreas Schaefflein, c.o.b. as G.S. Sheet Metal, and S.N. Ventilation Heating Limited, c.o.b. as Steve's Sheet Metal Company, (Respondents). (*Dismissed*).

## SALE OF A BUSINESS

**0627-85-R:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Aristocraft Drywall Ltd. and Advance Drywall Limited, (Respondent). (*Withdrawn*).

**2005-85-R:**Energy and Chemical Workers Union, Local 424, (Applicant) v. St. Mary's Cement Ltd., Pre-Con Company and Canada Building Material Company, (Respondents). (*Withdrawn*).

**2214-85-R:**Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Pic River Forest Products Inc. Agassiz Transport Inc. Buchanan Forest products Ltd. Ronald LeBlanc and Danny Barrett, (Respondents). (*Withdrawn*).

**3437-85-R:**Sheet Metal Workers International Association Local 537, (Applicant) v. Gerhard Andreas Schaefflein, c.o.b. as G.S. Sheet Metal, and S.N. Ventilation Heating Limited, c.o.b. as Steve's Sheet Metal Company, (Respondents). (*Dismissed*).

## UNION SUCCESSOR RIGHTS

**1117-85-R:**Graphic Communications International Union #542M, (Applicant) v. J. H. French & Company, Limited, (Respondent). (*Withdrawn*).

**1511-85-R:**Hamilton Printing Pressmen and Assistants Union Local 176 Subordinate to The Graphic Communications International Union, (Applicant) v. Universe Typographers Ltd., (Respondent). (*Withdrawn*).

**1512-85-R:**Hamilton Printing Pressmen and Assistants Union Local 176 Subordinate to the Graphic Communications International Union, (Applicant) v. W. L. Griffin Printing Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1499-85-R:**Darrell G. Mitts, (Applicant) v. Retail, Wholesale, Hotel & Restaurant Employees Union Local 448, (Respondents) v. 364803 Ontario Ltd. O/A Embassy Hotel, (Intervener).

Unit: "all full-time and part-time waiters, waitresses, bartenders, and doormen of the intervener employed in the Beaver Lounge and the Sunny Side Lounge excluding one manager and one assistant manager." (9 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	10
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	6

**1533-85-R:**Gary Barlow, (Applicant) v. United Steelworkers of America, (Respondent) v. 472275 Ontario Limited, c.o.b. as Industrial Welding Products Co., (Intervener).

Unit: "all employees of 472275 Ontario Limited, c.o.b. as Industrial Welding Products Co. at 510 Beach Road, Hamilton and at the employer's existing branches in St. Catharines and Oakville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (11 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer	11
Number of persons who cast ballots	11
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	4

**1541-85-R:**Alan Wackett, (Applicant) v. Energy and Chemical Workers Union C.L.C., (Respondent) v. Glitsch Canada Ltd., (Intervener).

Unit: "all employees of Glitsch Canada Ltd. at Uxbridge, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (42 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	29
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	28

**1896-85-R:**Cletus Timmons, (Applicant) v. International Beverage Dispensers and Bartenders Union - Local 280, (Respondent). (12 employees in unit). (*Dismissed*).

**1946-85-R:**Gerard Lapensee, (Applicant) v. General Worker's Union, Local 1030 of the U.B.C. and J. of A., (Respondent) v. F. leBlond Cement Products Ltd., (Intervener). (2 employees in unit). (*Granted*).

**1947-85-R:**K. M. Govenlock, (Applicant) v. International Woodworkers of America, (Respondent). (23 employees in unit). (*Granted*).

**1948-85-R:**Douglas Branigan, Roger DeAngelis, David C. McCullough and George Sowa, (Applicants) v. United Steelworkers of America, (Respondent). (4 employees in unit). (*Dismissed*).

**1951-85-R:**Laura Turner, (Applicant) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Respondent) v. Canada Trustco Mortgage Company, (Intervener). (16 employees in unit). (*Withdrawn*).

**2034-85-R:**Le Patro D'Ottawa, (Applicant) v. Canadian Union of Public Employees, (Respondent). (30 employees in unit). (*Granted*).

**2043-85-R:**Wilma Vanwensem, (Applicant) v. Hotel Employees, Restaurant Employees & Bartenders Union, Local 604, (Respondent) v. Red Oak Inn (Peterborough), (Intervener). (71 employees in unit). (*Withdrawn*).

**2109-85-R:**M. Stephen McCoy, (Applicant) v. The Retail, Wholesale, Hotel and Restaurant Employees' Union, Local 448, (Respondent). (18 employees in unit). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2097-85-U:**McDonnell Douglas Canada Ltd., (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW-CLC) and Local 1967, William B. Patrick and Munir A. Khalid, (Respondents). (*Granted*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

**2212-85-U:**Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Forest Products Inc. Agassiz Transport Inc. Buchanan Forest Products Ltd. Kenneth Buchanan, (Respondents). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1296-82-U; 0195-83-U:**Luciano D'Alessandro and Donato Marinaro, (Complainants) v. Labourers' International Union of North America, Local 1089, and Rocco D'Andrea, (Respondents). (*Granted*).

**1143-84-U:**Ronald Fraser, (Complainant) v. Local 134, Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

**0326-85-U:**The Association of Professional Student Services Personnel, (Complainant) v. The Board of Education for the City of York, (Respondent) v. Elizabeth A. Carveth, (Intervener). (*Withdrawn*).

**0568-85-U:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Complainant) v. C. S. Yachts Ltd. (Respondent). (*Withdrawn*).

**0606-85-U:**Ontario Public Service Employees Union, (Complainant) v. Port Colborne Ambulance Service, (Respondent). (*Withdrawn*).



**0630-85-U:**Richard B. James, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 444 and Chrysler Canada Limited, (Respondent). (*Dismissed*).

**0631-85-U:**Ronald E. McKenzie, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 444 and Chrysler Canada Limited, (Respondent). (*Withdrawn*).

**0809-85-U:**Anthony Counahan, (Complainant) v. Converter Man Limited, Pedro Cifuentes and Peter Cifuentes, (Respondents). (*Withdrawn*).

**1038-85-U:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Granted*).

**1093-85-U:**United Steelworkers of America and its Local 9011, (Complainant) v. Radio Shack Division of Tandy Electronics Limited, (Respondent). (*Dismissed*).

**1300-85-U:**Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail, Division of Canadian Newspapers Company Limited, (Respondent) v. Bonnie Graham, Dan McQuade, Martin Smyth and Daniel Ford, (Intervenors). (*Withdrawn*).

**1361-85-U:**Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Complainant) v. Anderdon Estates Limited, c.o.b. as The Exchange Restaurant and Tavern, (Respondent). (*Withdrawn*).

**1363-85-U:**Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Westburne Industrial Enterprises Ltd., (Respondent). (*Withdrawn*).

**1377-85-U:**Mr. Frank Harris, (Complainant) v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, and Ontario Hydro Commission, (Respondent). (*Dismissed*).

**1401-85-U:**London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Complainant) v. Kitchener-Waterloo Hospital, (Respondent). (*Withdrawn*).

**1444-85-U:**Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Complainant) v. Honest Ed's Limited, (Respondent). (*Withdrawn*).

**1481-85-U:**The Canadian Union of Operating Engineers and General Workers Local Union No. 101, (Complainant) v. The Municipality of Metropolitan Toronto, (Respondent) v. Canadian Union of Public Employees Metropolitan Toronto Civic Employees Union, Local 43, (Intervener). (*Withdrawn*).

**1507-85-U:**Laurentian University Support Staff Association, (Complainant) v. Laurentian University of Sudbury, (Respondent). (*Withdrawn*).

**1510-85-U:**Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Data Security Limited, (Respondent). (*Withdrawn*).

**1536-85-U:**Ontario Public Service Employees Union, (Complainant) v. St. Andrew's Centennial Manor (Swiss Nursing Homes Inc.), (Respondent). (*Withdrawn*).

**1549-85-U:**Labourers' International Union of North America, Local 607, (Complainant) v. Alex MacIntyre and Assoc. Ltd., (Respondent). (*Withdrawn*).

**1568-85-U:**Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation #46 and/or General Property Management, (Respondent). (*Withdrawn*).

**1569-85-U:**Tim O'Shea, (Complainant) v. C.U.P.E. 1974 and Kingston General Hospital, (Respondent). (*Withdrawn*).

**1571-85-U:**The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union 128, (Complainant) v. O'Connor Tanks Limited, (Respondent). (*Withdrawn*).

**1643-85-U:**The International Association of Machinists and Aerospace Workers, (Complainant) v. Dickson Brothers Ltd., (Respondent). (*Withdrawn*).

**1648-85-U:**Aaron Lemon, (Complainant) v. The Renfrew County Board of Education and Ontario Secondary School Teachers' Federation, (Respondent). (*Withdrawn*).

**1659-85-U:**Gregory Chymyck, (Complainant) v. Union Committee of Unit 13, Local 27 and Bendix Heavy Vehicle Systems, (Respondent). (*Withdrawn*).

**1708-85-U:**The Ontario Public Service Employee's Union Local, (Complainant) v. Northern College of Applied Arts & Technology, (Respondent). (*Withdrawn*).

**1723-85-U:**International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Complainant) v. Stackpole Limited, (Respondent). (*Withdrawn*).

**1747-85-U:**David Powell, Klaus Janitz, William Thomson, et al, (Complainants) v. Local 542M of the Graphic Communications International, (Respondent) v. Reid Dominion Packaging Limited, (Intervener). (*Withdrawn*).

**1749-85-U:**Gordon David Fleming, (Complainant) v. Duracell Inc., (Respondent). (*Withdrawn*).

**1753-85-U:**United Steelworkers of America, (Complainant) v. Duracell Inc., (Respondent). (*Withdrawn*).

**1757-85-U:**Mr. Kayne Krienke, (Complainant) v. Lumber and Sawmill Workers Union, (Respondent). (*Withdrawn*).

**1768-85-U:**Mechanical Contractors Association Ontario, (Complainant) v. Maytank & Pipe Company, (Respondent). (*Withdrawn*).

**1794-85-U:**Ontario Public Service Employees Union, (Complainant) v. Alfred Hicks, (Respondent). (*Withdrawn*).

**1810-85-U:**Andrew Michael George, (Complainant) v. U.A.W. Local 222, (Respondent). (*Withdrawn*).

**1817-85-U:**The Canadian Union of Public Employees, (Complainant) v. Mariann Home (Richmond Hill), (Respondent). (*Withdrawn*).

**1834-85-U:**Ontario Nurses' Association, (Complainant) v. The Porcupine Health Unit, (Respondent). (*Withdrawn*).

**1838-85-U:**International Woodworkers of America, (Complainant) v. Kingswood Frame Manufacturing Corp., (Respondent). (*Withdrawn*).

**1839-85-U:**United Steelworkers of America, (Complainant) v. Burnstein Castings Ltd., (Respondent). (*Withdrawn*).

**1859-85-U:**Lyle Roy Haynes, (Complainant) v. The Hamilton Spectator (A Division of Southam Inc.) and Alfred R. Siaroff, (Circulation Manager), (Respondent). (*Withdrawn*).

**1869-85-U:**Ontario Public Service Employees Union, (Complainant) v. Fleetwood Ambulance Service, (Respondent). (*Withdrawn*).

**1872-85-U:**Orlando Nunes, (Complainant) v. Leonor Tavares General Supervisor for Empire Maintenance, (Respondent). (*Withdrawn*).

**1873-85-U:**Maria Cota, (Complainant) v. Leonor Tavares - General Supervisor for Empire Maintenance Co., (Respondent). (*Withdrawn*).

**1907-85-U:**Henry Sylvanus Williams, (Complainant) v. Toronto Civic Employees Union Local 43, (Respondent). (*Withdrawn*).

**1994-85-U:**Olive Minott, (Complainant) v. Jerry Goger, (Respondent). (*Withdrawn*).

**2003-85-U:**Energy and Chemical Workers Union, Local 424, (Complainant) v. St. Mary's Cement Ltd., Pre-Con Company and Canada Building Material Company, (Respondents). (*Withdrawn*).

**2090-85-U:**Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail, Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).

**2114-85-U:**Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC-AFL-CIO), (Complainant) v. The Globe and Mail, Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).

**2118-85-U:**Energy and Chemical Workers Union, (Complainant) v. Cavalier Beverages Limited, (Respondent). (*Withdrawn*).

**2172-85-U:**Thomas R. Fraser, (Complainant) v. Canadian Union of Public Employees Local 136, (Respondent). (*Withdrawn*).

**2213-85-U:**Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Pic River Forest Products Inc.; Agassiz Transport Inc.; Buchanan Forest Products Ltd. and Kenneth Buchanan, (Respondents). (*Withdrawn*).

**2305-85-U:**United Brotherhood of Carpenters and Joiners of America, Local 26179, (Complainant) v. Egan Visual Inc., (Respondent). (*Withdrawn*).

**2357-85-U:**Retail, Wholesale and Department Store Union, (Complainant) v. Beaver Foods Limited, (Respondent). (*Withdrawn*).



## APPLICATIONS FOR CONSENT TO PROSECUTE

**0569-85-U:**United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. C. S. Yachts Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**1628-85-M:**Betty Gill, 7 Third St. Thedford Ont N0M 2N0, (Applicant) v. London and District Service Workers Union - Local 220, (Respondent Trade Union) v. Craigholme Nursing Home, (Respondent Employer). (*Withdrawn*).

**1887-85-M:**Ina Beintema, (Applicant) v. Service Employees' Union, Local 210, (Respondent Trade Union), v. St. Andrew's Residence, Chatham, (Respondent Employer). (*Granted*).

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**1987-85-M:**Canron Inc., Plastico Division, (Employer) v. Cement, Lime, Gypsum and Allied Workers, Division of The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and International Molders and Allied Workers Union, Local 64, (Trade Union). (*Granted*).

## JURISDICTIONAL DISPUTES

**1618-85-JD:**Robertson-Yates Corporation Limited, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 18, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1791-85-M:**United Steelworkers of America, (Applicant) v. Exide Canada Corp., (Respondent). (*Withdrawn*).

**2008-85-M:**The Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, (Applicant) v. The Globe and Mail Division of Canadian Newspapers Company Limited, (Respondent). (*Withdrawn*).

## COLLEGES COLLECTIVE BARGAINING ACT

**0984-85-U:**The Ontario Public Service Employee's Union Local, (Complainant) v. George Brown College, (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**0689-84-M:**Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Plibrico (Canada) Limited, (Respondent). (*Granted*).

**1667-84-M:**The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of Local Union 527, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Dismissed*).

**0625-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Aristocraft Drywall Ltd. and Advance Drywall Limited, (Respondent). (*Withdrawn*).

**0653-85-M:**United Brotherhood of Carpenters and Joiners of America, Local 2041 and Jean St. Louis, (Applicant) v. Brunswick Drywall (Ontario) Ltd., (Respondent). (*Withdrawn*).

**0915-85-M:**United Brotherhood of Carpenters and Joiners of America Local 93, (Applicant) v. P. J. Daly Limited, (Respondent). (*Withdrawn*).

**1041-85-M:**Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tamerlane Drywall Limited, (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,  
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February 1986





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**A Monthly Series of Decisions from the  
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**1622-85-R Sheet Metal Workers' International Association, Local Union 47, Applicant, v. Bell Air Conditioning Inc., Respondent**

**Construction Industry - Dependent Contractor - Employee - Sheet metal workers obtained for construction project through hiring hall - Whether employees or independent contractors - Whether employer engaged in construction industry**

**BEFORE:** *Thomas S. Kuttner*, Vice-Chairman, and Board Members *F. W. Murray* and *H. Kobryn*.

**APPEARANCES:** *David Jewitt*, *Karen Clifford* and *Bob Belleville* for the applicant; *Lynda J. Townsend*, *Jan Woodend* and *Daryl Hayes* for the respondent.

**DECISION OF THE BOARD;** February 25, 1986

1. The name of the applicant herein is amended to read: "Sheet Metal Workers International Association, Local Union 47"; that of the respondent is amended to read: "Bell Air Conditioning Inc".

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*, and further that, within the meaning of section 137(1)(a), it is an affiliated bargaining agent of an employee bargaining agency designated under section 139(1) of the Act, namely, the Sheet Metal Workers International Association and the Ontario Sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 629 of the Sheet Metal Workers' International Association.

3. This is an application for certification made pursuant to the construction industry provisions of the Act and brought by the applicant in accordance with section 144(1). The Board appointed a Labour Relations Officer to inquire into and report to the Board on the composition of the bargaining unit and the list of employees with respect to which this application was brought. As a result of discussions with the Labour Relations Officer, the parties are agreed that the bargaining-unit description should be that normally found appropriate by the Board for the sheet metal trade. Accordingly, the Board finds that all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in Board area 15, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The parties are also agreed that the list of persons to be considered for purposes of the count should be limited to the two on whose behalf membership evidence was tendered in support of this application. The respondent however disputes the status of these individuals as employees and asserts that their relationship to the respondent was that of independent contractors. Accordingly, inasmuch as there were no persons in its employ and present at work on the date of the making of this application, the respondent submits that this application should be dismissed.

5. Daryl Hayes, Director of Marketing for the respondent, testified as to the nature of the respondent's business and as to the circumstances surrounding this application. The principal business of the respondent consists of the servicing and maintenance of heating, air-conditioning and refrigeration units in the general industrial sector. Out of a staff of thirteen, the respondent employs seven refrigeration and air-conditioning technicians on a permanent basis. Three of these are registered and have been in the employ of the respondent for a period of more than 5 years; four have been in the employ of the respondent for a period of less than one year and are currently completing the apprenticeship program for registration as refrigeration and air-conditioning technicians. The respondent does not employ as part of its permanent staff any journeymen sheet metal workers or registered sheet metal apprentices.

6. The respondent also engages to some degree in the installation of air-conditioning and refrigeration equipment in the construction industry. Such installation may require the performance of sheet metal work. It has been the practice of the company to have such work performed by its refrigeration and air-conditioning technicians. Mr. Hayes estimated that on an average, 25 hours of sheet metal work must be performed each month out of a total number of 1150 hours worked by the staff.

7. In September 1985 the respondent successfully bid on a contract calling for the installation of variable air volume boxes (VAVs) at the premises of two commercial tenants carrying on business at the St. Laurent Shopping Centre situated in Ottawa. These boxes regulate the amount of air flowing through a forced air system to a specific location serviced thereby. This contract was tendered in conjunction with a construction expansion project being carried on at the St. Laurent Shopping Centre and it called for the performance of sheet metal work. The parties are not in dispute that in the performance of this work the respondent was engaged in the construction industry within the meaning of section 1(1)(f) of the Act.

8. Work on the project commenced in late September, with the installation of the VAVs being performed by two of the respondent's technicians. Approximately half of the work had been completed when, on September 29th, the site supervisor of the St. Laurent Shopping Centre project made representations to the respondent with respect to the performance of the work by its own technicians. Evidence as to the exact nature of those representations was not forthcoming, but the gist was that only unionized contractors could be on site, and further that, if work were to continue, it could be performed by qualified sheet metal workers who were members of the applicant. As a result of these representations, the respondent determined to pull its technicians from the job and to replace them with sheet metal workers referred to the respondent through the hiring hall of the applicant.

9. It is to be recalled that by virtue of regulation 57 of R.R.O. 1980 under the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, c. 24, the trade of sheet metal worker is one which has been designated as a certified trade for the purposes of that Act. Accordingly, by virtue of the provisions of section 11 of the Act, no person shall work or be employed in the sheet metal trade unless he holds either a subsisting certificate of qualification or one of apprenticeship in the trade, or has satisfied the Director that he otherwise meets the requirements of the Act to work in the trade. See *Irvcon Roofing and Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594 and *Mechanical Installations Roofing and Siding Ltd.*, [1985] OLRB Rep. Apr. 549. Of the respondent's technician work force, none is in possession of the requisite certificates; members of the applicant hold either a journeyman's certificate of qualification or one of apprenticeship.



10. Following telephone discussions between representatives of the applicant and of the respondent, two members of the respondent, Paul Tessier and Vincent Patry, one of whom was a qualified journeyman sheet metal worker and the other a registered sheet metal apprentice, were referred to the respondent for employment. These two individuals completed the installation of the VAVs at the St. Laurent Shopping Centre on September 30th to October 1st. The two were not processed by the respondent's personnel office as would be the ordinary employee engaged on its permanent staff. There was no pre-job interview, no discussion of terms and conditions of work, no review and transmittal of the respondent's employee handbook, indeed no personnel file opened whatsoever. Rather, the two members of the applicant presented the respondent's payroll officer with a table of applicable wage rates and authorized deductions and contributions, which had been excerpted from the current province-wide collective agreement governing between Ontario Sheet Metal and Air Handling Group AND Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference and advised that they were to be paid in accordance therewith. Payment at this rate rather than at the rate which the respondent set for its technicians had been agreed to between the representatives of the respondent and the applicant during their initial discussions. In addition, the respondent made the deductions and contributions required by the terms of the agreement. The employees themselves worked with their own tools, and although the work was performed without direct supervision by the respondent, there was at all times a representative of the respondent at the project in the capacity of supervisor to ensure that the contract was completed per the specifications. In point of fact the work was completed to the satisfaction of the respondent within two days.

11. On the basis of that evidence, counsel for the respondent argues that the two members of the applicant performing the sheet metal work in the installations at the VAVs in the St. Laurent Shopping Centre were engaged not as employees but as independent contractors. She stressed the transitory nature of their relationship to the respondent; that they were placed at the respondent's project by the applicant acting as a 'broker' or 'agent'; that the respondent did not participate in a formal sense in their selection, hiring or termination, nor did it set their wage rates or other terms and conditions of work; that they worked with their own tools, independently and not under direct supervision and control. Reference was made to the *Algonquin Tavern* case, [1981] OLRB Rep. Aug. 1057 and to the Board's extensive review there of the jurisprudence on the distinction between the status of an employee and that of an independent contractor. Counsel argued that by any of the traditional tests applied - that of 'control', the 'four-fold test', the 'integration test', or the 'statutory purpose test' - the two sheet metal workers who performed the work in question could only be classified as independent contractors. Their relationship with the respondent was not one of employment. Nor could it be asserted that these were dependent contractors within the meaning of the Act, for their relationship with the respondent was much too transitory to found that degree of economic dependence inherent in the concept of the dependent contractor articulated by the Board in *Craftwood Construction Company Limited*, [1980] OLRB Rep. Nov. 1613. Finally, it was submitted that even if the Board were to find an employment relationship, it would nevertheless be inappropriate to grant this application inasmuch as the respondent is involved in only a transitory and fleeting manner in construction work of this nature, which is ancillary to its principal servicing and maintenance business.

12. For the applicant it was argued that the extent to which the respondent may engage in construction work requiring the skills of a qualified sheet metal worker is irrelevant to the

question of whether the applicant is entitled to the bargaining rights which it seeks here. The fact of the matter is that at the time in question the respondent was engaged in construction work requiring such skills and determined to employ members of the applicant to perform the work in question admittedly after representations were made to it by the on-site construction supervisor. The referral of the two members of the applicant through its hiring hall to meet the requirements of the respondent for this project reflects the normal practice of the construction industry, and within the context of that industry the relationship between the two members of the applicant and the respondent could only be termed as one of employment.

13. As indicated in the brief oral decision given at the conclusion of the hearing herein, the Board is of the view that this application must be granted. Interesting as the analogy may be between the booking of burlesque dancers through agents to perform at various establishments in the hotel industry, and the referral by a craft trade union of its members to exercise their skills on behalf of employers in the construction industry, the Board finds the conclusions reached in the *Algonquin Tavern* case, *supra*, as to the status of the burlesque dancers there under consideration as independent contractors of no application to the situation here before it. This is a case arising in the construction industry in which the referral to employment of members of a craft trade union to meet the particular requirements of a specialty contractor carrying on business within the industry is characteristic. The cyclical and seasonal nature of the industry combined with the changing needs and requirements for different skills at any particular job site militate against the long-term stable employment relationship found in the industrial sector.

14. Rather, one finds an extremely mobile work force and a series of employment relationships of greater or lesser duration, some of which, as here, may be of a transitory nature. This is so because the skilled tradesman is only engaged by various specialty contractors to meet the particular manpower requirements of the moment. The labour force of the individual contractor expands and contracts in proportion to the degree to which the contractor has been successful in bidding for the limited work available. The long-term stability which one finds elsewhere in the employment relationship is found in the construction industry in the relationship between the skilled tradesman and his craft trade union. Among its varied activities, the craft trade union fulfills a personnel function for the contractors in any particular sector of the industry, by referring to them for employment, through the hiring hall, sufficient skilled tradesmen to meet their particular manpower requirements. The Board has little difficulty in concluding that in this case, as is common throughout the construction industry, skilled tradesmen were referred to the respondent for employment, and were in fact engaged as employees to perform the sheet metal work required at the St. Laurent Shopping Centre project.

15. Does the fact that the respondent agreed with the applicant, to engage two of its members as employees on terms and conditions of employment identical to those obtaining under the applicable collective agreement in the sheet metal trade, have an impact on the outcome of this case? The Board finds that this is a case in which the general principles first adumbrated in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028, and further developed in *Jen-Ry Utility Contracting Company Limited*, [1985] OLRB Rep. Aug. 1243 are applicable. In *Nicholls-Radtke*, the Board found that the requirement imposed by a trade union upon an employer, that it enter into a collective agreement voluntarily recognizing it as a condition precedent to the supplying by the trade union of men to the employer for work, did not attract the application of section 13 of the Act. In *Jen-Ry*, the Board held that the selection by an employer of a particular trade union to supply it with men as required for employment and



the deduction of dues from those employees authorizing such deduction prior to the entry into a collective agreement or other agreement of voluntary recognition likewise did not attract the application of that provision of the Act.

16. Here, the issue of employer support and possible violation of section 13 of the Act has not been raised. Indeed, it is the position of the respondent that it is, and has continuously been, opposed to the obtaining of members of its work force through the auspices of the applicant, and that it was obliged to do so only by force of circumstances. The relevance of *Nicholls-Radtke* and *Jen-Ry* to these circumstances lies in the extent to which both show that the 'selection' by an employer of a particular trade union as the source of supply for its manpower requirements, is a common and accepted feature in the construction industry. Such selection does not negate the validity of subsequent bargaining rights otherwise properly obtained. As noted earlier, almost no evidence was led with respect to the circumstances surrounding the determination by the respondent that it would turn to the applicant as a source of manpower. What little evidence there was, was directed solely to the issue of the employment status of the members of the applicant referred to the respondent, which is dealt with above. There is no evidence whatsoever that either the site supervisor at the project or any other person acting on behalf of the applicant engaged in any activity prohibited by the Act in making representations to the respondent that members of the applicant could be obtained in order to perform the work in question. Had there been evidence of such conduct, it may well have vitiated application of the principles articulated in *Nicholls-Radtke* and *Jen-Ry*.

17. At the time that that project supervisor made his representations to the respondent, it had several courses of action open to it. It could have ignored the representations and proceeded to continue with the performance of its contract using its technician work force, although at the risk of some action being taken against it by parties adverse in interest. It could have heeded them and arranged for the subcontracting of the work in question to a unionized sheet metal contractor. Or, alternatively, it could have acted as it did here. The Board is satisfied here, in light of all of the evidence before it, that the respondent, for its own commercial reasons, determined to continue its participation in the construction project at the St. Laurent Shopping Centre by engaging members of the applicant as employees to perform the work in question. It is with respect to those employees that this application for certification is now brought.

18. As to the further submissions made on its behalf, it may well be, that the principal business of the respondent is not in the construction industry at all but rather in the industrial sector engaged in the servicing and maintenance of refrigeration, air-conditioning and heating equipment. Nevertheless on the day and at the time in question the respondent was operating a business in the construction industry within the meaning of section 117(c) of the Act and as such was an employer with respect to which the construction industry provisions of the Act apply. See *Windsor Board of Education* [1983] OLRB Rep. May 831. The fact that the respondent simultaneously carries on business outside of the construction industry cannot affect this application, and likewise, this application cannot have an effect on the business of the respondent to the extent that it falls outside of the construction industry. This indeed is the answer to the concerns raised by the respondent as to the economic consequences which the grant of this certificate would have upon its business. Its concerns have no foundation, presuming of course that it maintains its current profile of heavy involvement in the industrial sector and minimal involvement in that of construction. The Board hastens to note that however real those concerns might be, they cannot have an effect upon the question of whether or not a certificate is to issue.



19. At paragraph 3, the Board has already found the bargaining unit sought by agreement of the parties to be a bargaining unit appropriate for collective bargaining. On the basis of all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent who were in the bargaining unit at the time the application was made, were members of the applicant on October 11, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

20. In accordance with the provisions of section 144(2) a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. Further, in accordance with the same provisions of the Act, a certificate will issue to the applicant trade union in respect of all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

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**1490-83-U Maurice Berlinguette, Pat Proulx, Lionel Trudel, Paul Pilon, Complainants, v. Labourers' International Union of North America, Local 1036, Respondents**

**Duty of Fair Referral - Unfair Labour Practice - Referrals made as per usual practice re appointment of stewards - Not unlawful though resulting in referral of persons not at top of out-of-work list - Departures from ordinary rules not unlawful in circumstances - Referral duty not giving Board power to arbitrate what rules should govern hiring hall**

**BEFORE:** *Owen V. Gray*, Vice-Chairman.

**APPEARANCES:** *A. Bradley, Leo Berlinguette, Maurice Berlinguette, Pat Proulx, Lionel Trudel* and *Paul Pilon* for the complainants; *S.B.D. Wahl* and *J. Lewis* for the respondents.

**DECISION OF THE BOARD;** February 7, 1986

1. In this complaint filed under section 89 of the *Labour Relations Act*, the complainants, all members of the respondent trade union, complain that the union has violated section 69 of the *Labour Relations Act*, which provides:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

When it was filed in October, 1983, this complaint referred to an alleged failure by Jimmie Lewis, the respondent's business manager, to provide the complainants with copies of the respondent's out-of-work lists and other documents covering hiring hall transactions during the period January to September 1983, and went on to allege baldly that "...Jimmie Lewis has violated Article 69 of the Labours [sic] Relations Act by using his office as an Instrument of Favoritism and patronage, due to his hiring hall practice."

2. On the first day of hearing February 23, 1984, the respondent moved for dismissal on the grounds that a refusal to supply information could not constitute a violation of section 69 of the *Labour Relations Act*, and that the allegation just quoted failed to meet the requirements of Rule 72 of the Board's Rules of Procedure with respect to particularity. At the conclusion at that day of hearing, I directed that the complainants file a written statement of the material facts, actions and omissions on which they intended to rely. That direction was confirmed in a decision dated April 2, 1984, (reported at [1984] OLRB Rep. April 586) in which I concluded that a refusal of information could constitute a violation of section 69 of the Act if the refusal was "arbitrary, discriminatory or in bad faith." After that decision was released, the complainants made further inquiries of Jimmie Lewis and, after receiving his answers, filed the following Bill of Particulars dated May 22, 1984 ("the bill of particulars"):

1. Mr. Reynolds was improperly referred to Cliffside Construction Company. Worked June 16th 1983 until November 18th, 1983.
2. Mr. William Suppa was improperly referred to Cliffside Construction Company. July 21st 1983 worked until August 24th 1983.
3. Mr. Ronald Dauphin was improperly referred to Bird Construction on March 12th 1984. He is still employed at Bird Construction.
4. Mr. Jacques Pitre was working for Brunswick Drywall, Ontario Ltd. on March 15th 1984 and probably before that time. He was number 231 on the Out-of-Work-List on March 15th 1984. Date of lay off April 12th, 1984.
5. Mr. Joseph Neveau was improperly referred to Cliffside Construction Company on June 16th 1983. He worked till December 10th, 1983. Layed [sic] off December 10th, 1983.
6. Mr. Vincent Chillelli - the date on the Out-of-Work-List is improper and could result in an improper referral.
7. Mr. Ed Danz was improperly referred on September 21st, 1983 to Laurentian Masonry Sudbury Ltd. until September 28th, 1983 also worked October 2nd, 1983 until October 10th, 1983. He was then laid off.
8. Mr. Jack Barry was improperly referred on September 7th, 1983 to Sampson Construction Company. He worked until September 20th, 1983 then laid off. This improper referral would give him recall rights and then he would be eligible for more improper referrals in the future.
9. Mr. Waito was improperly referred on November 9th 1983 to Sampson Construction.

The bill of particulars makes no reference to any failure of the respondent to supply information. When the hearing of this complaint resumed on June 27, 1984, the complainants' representative confirmed that they did not wish to pursue any allegations concerning their earlier attempts to obtain information from the respondent.

3. The parties' evidence and argument occupied 11 days of hearing on various dates from June 27, 1984, to May 23, 1985. At the very end of this process, in the course of his reply argument, the complainants' representative withdrew their complaint with respect to the matters referred to in paragraphs 4, 5, 6, and 7 of their bill of particulars. This decision, therefore, deals only with the 5 work referrals complained of in paragraphs 1, 2, 3, 8 and 9 of the complainants' bill of particulars.

4. The respondent is a trade union which engages in the referral of persons to employment pursuant to the provisions of at least two collective agreements: the provincial agreement between the Labourers International Union of North America, Ontario Provincial District Council, and the relevant employer bargaining agency, covering the industrial, commercial and institutional sector of the construction industry ("the ICI agreement") and the Labourers Distribution Pipeline Agreement for Canada between the Pipeline Contractors Association of Canada and the Labourers International Union of North America ("the distribution pipeline agreement"). Both agreements require that employers bound by them obtain their workers from the hiring hall of the appropriate local union so long as that union has qualified workers available for work. With certain exceptions, the union has the sole right to select the persons who will be referred to work in response to an employer's request. An employer dealing with Local 1036 under the ICI agreement has the right to re-hire by name any unemployed union member in good standing whom that employer has employed during the preceding twelve months. The distribution pipeline agreement gives a bound employer the right to retain the original crew on a particular job until that job is completed, and the further right to re-hire by name some or all (depending on the circumstances) of those union members in good standing whom it has employed within the previous six months.

5. Under its constitution, members of the respondent union elect a business manager, who becomes its full-time, paid employee. The operation of the respondent's hiring hall is one of the business manager's chief functions. In the time frame with which this complaint is concerned, there was no single document setting out the rules which governed or guided the business manager in the selection of members for referral to work in response to employer requests.

6. The current business manager, Jimmie Lewis, was first elected to that position in 1973, displacing the man who had served as business manager since the local came into existence in the early 1960's. Lewis testified that when he took office he continued the system employed by his predecessor in referring members to work, as modified from time to time thereafter by resolutions of the membership. That system involved the maintenance of an "out-of-work list." Upon his registering for employment, an unemployed member's name would be placed on this list. If he had become unemployed as a result of lay-off from a job at which he had worked less than fourteen working days, his name would be returned to the position it occupied at the time he was referred to that job. If he had quit or been terminated for cause or laid off after more than fourteen days' work, the member's name would be placed at the bottom of the list. As a general rule, the business manager or someone acting under his supervision would respond to an employer's request for a worker by going through the out-of-work list staring at the top and contacting in succession each member with the qualifications required by the employer for the work in question. The job opportunity would go to the first member contacted who accepted the referral, and his name would then be struck from the list. The complainants agree that these are the general rules and they acknowledge that a



member may be referred to work regardless of his position on the list if a former employer exercises a collective agreement right to recall him by name. At the time Lewis became business manager, it was part of the hiring hall practice that members of the union's executive board who were laid off would be sent out to work again as soon as possible; in effect, they would be placed at the top of the list. This preference was eliminated by resolution of the membership in 1979.

7. The collective agreements referred to earlier each recognize that the union will appoint a steward from among the employees it sends to a job. The steward acts as the union's on-site representative in matters involving the administration of the collective agreement. The agreements afford some protection to that function, by requiring that the steward not be excluded from overtime opportunities and that he be the last or next-to-last person laid off. Lewis testified that it has been his policy and practice to ensure that the person appointed as steward is the person best qualified to act as steward on the job in question. In selecting a person to be dispatched as steward, Lewis does not limit himself to persons whose names appear at the top of the list. He takes the position that he should dispatch the best qualified person regardless of that person's position on the list. From his perspective, appropriate qualifications include experience as a steward on similar projects, knowledge of the provisions of the particular collective agreement which applies to the project, familiarity with the scope of jurisdiction asserted by the Labourers union on projects of that kind and of the kinds of jurisdictional difficulties which might be experienced with other crafts who are expected to be at work on the site. Familiarity with the area in which the job is to be performed may be important on jobs outside the immediate vicinity of Sault Ste. Marie. The ability to speak languages other than English is also an important consideration, because many of the local's members do not speak English. Past experience in dealing with the particular employer and familiarity with his supervisory personnel can also be important in some circumstances. The complainants said that they had not been aware of any situation in which the worker appointed as steward on a job had been sent to that job otherwise than as a result of his position on the out-of-work list. In its evidence, however, the respondent provided a number of examples of members having been referred to a job and appointed steward although there had been others above them on the out-of-work list who had the qualifications requested by the employer.

8. Mike Reynolds and Bill Suppa were the President and Recording Secretary, respectively, of the respondent trade union when Lewis referred them to employment with Cliffside Construction on June 16 and July 21, 1983, respectively. Neither man's name appeared on the regular out-of-work list at the time of these referrals. Reynolds had been employed as a full-time business agent to assist Mr. Lewis from June 1, 1981 to February 4, 1983. Employment opportunities for labourers were plentiful in 1981. Mr. Reynolds had quit his existing job in order to take up the position with the local. Had he put his name at the bottom of the "out-of-work list" at that time, as he would have been entitled to do, his name would clearly have been at the top when his appointment as business agent terminated in 1983. It was Lewis' policy that persons laid off from full-time employment with the union ought then to be treated as being at the top of the out-of-work list and referred to the first satisfactory work opportunity. He noted this approach had been followed when he was first elected as business manager: his predecessor had been referred out to work immediately, without complaint by the membership. Ron Dauphin had been employed by the union as a business agent for six months in 1981; he too had been referred out to work immediately upon the termination of that employment, although his name was not then on the out-of-work list. Lewis testified that the referral of Reynolds to Cliffside Construction in June of 1983 could

have been justified on the basis of this past practice, since this was the first referral of Reynolds to work following the completion of his assignment as business agent in February of that year. However, that was not the basis of the referral decision.

9. Cliffside was corporate relative of a company referred to in evidence as "McDace", a distribution pipeline contractor to whom the union had previously supplied men for a project in 1981 and 1982. A number of difficulties had arisen during that earlier project. Mindful of those difficulties, Lewis met in June 1983 with Michael Slugoski, who was general superintendent for the 1983 Cliffside project and had been general superintendent for McDace on the earlier project. In the course of their discussion about how the earlier problems could be avoided on Cliffside's 1983 project, Lewis and Slugoski agreed it would be helpful if each of the two required crews included a top-notch steward. Lewis decided to refer Reynolds to the Cliffside job as one of those two stewards, as he regarded him as best qualified to fill that function.

10. Bill Suppa's name was not on the regular out-of-work list because his name was being used to test and de-bug a computer system which the union was then developing (and later implemented) for the maintenance and processing of hiring hall records and job referral transactions. If his name had been on the regular list, however, it would not have been at or near the top. Lewis referred Suppa to Cliffside as the second of the two stewards required for Cliffside's two crews, because he considered Suppa best qualified to act in that capacity.

11. Lewis says quite simply that the referrals of Reynolds and Suppa to Cliffside were made in accordance with his policy and practice to refer the best possible stewards to each job regardless of the positions of the appointees on the out-of-work list. I do not propose to review in detail the evidence I heard concerning the qualifications of Messrs. Reynolds and Suppa. They both had extensive experience in all aspects of labourers' work. They were familiar with pipeline work, something with which only a minority of the local's members had had any experience. They both had extensive experience in collective agreement administration. While the complainants challenged the theory that the business manager ought to appoint the most qualified persons as stewards, and suggested that other members of the union could have done an adequate job or ought to have been given an opportunity to try, they did not seriously challenge the proposition that Reynolds and Suppa were among the best, if not the best, qualified members of the union to act as stewards on the Cliffside job.

12. Jack Barry was referred to work for Sampson Construction Company on September 7, 1983, and worked for Sampson until September 20th, when he was laid off. The referral came about as a result of a telephone call Lewis received from Wes Carson, Sampson's superintendent. Carson told Lewis that Sampson had been awarded an emergency job at Algoma Steel. It had to be done quickly, and would be completed in less than two weeks. Although Sampson already had 3 or 4 Local 1036 members working on the job, Carson felt he could add one more labourer. He asked for Jack Barry by name because Barry had worked for Sampson before, knew its employees and supervisory staff and was familiar with its yards. Carson explained that he needed someone who could work on the night shift and go back and forth between Sampson's yard at Cedar Street and the one it maintained at Algoma Steel in order to get supplies for the job. Carson thought that Barry could do this without supervision, and he was confident that Barry could handle the jackhammer work which would also be involved. Because the job was a short one, Carson said, he would not have time to break in a new person for this work. If the union would not send Jack Barry, he did not want the



union to send anyone at all. Sampson did not at that point have the right under the applicable collective agreement to request Barry by name; Barry's last employment with Sampson had ended more than twelve months previous.

13. Lewis was not happy about Carson's statement that he would not take anyone but Barry, but he took that statement seriously; he thought Carson meant it. He weighed a number of considerations. Sampson had three or four other members of the local in its employ and also had a contract with the carpenters' union. He thought about whether the failure to supply Barry would result in those other members being overworked or in transfer of labourers' work to members of the carpenters' union. Barry had been unemployed for over a year. The job was a short one - so short that a member sent to the job would not lose his place on the out-of-work list, unless discharged by Sampson for unsatisfactory performance. Lewis had to consider whether that would be the result if he sent anyone else. In the end, he decided to refer Barry to the job.

14. Percy Waito was referred to work for Sampson Construction on November 9, 1983. Waito had worked for Sampson from August 1981 to September 15, 1982, when he was laid off. Waito was the steward at Sampson's YMCA project when he was laid off. At that time Sampson was still employing labourers on a project in another area of the city. The applicable collective agreement required that "a union steward shall be one of the last two (2) employees retained on the job ...". Waito felt this obliged Sampson to transfer him to the other project and lay off one of the other labourers working there, if necessary, so that he would remain employed with Sampson until the other project was completed. Waito brought this grievance to Lewis. Lewis asked Mike Reynolds, who was then employed by the local as a business agent, to discuss the matter with Sampson's owner. One of the matters they discussed was that the superintendent on the project to which Waito would be transferred if he was then reinstated was a man with whom Waito did not get along well, and this might cause problems. This was not presented as a legal defence to the grievance but, rather, as a practical consideration in devising a suitable settlement. Sampson expected to get further work which would require further labourers. He proposed settling the grievance on the basis that Waito would be dispatched to fill the very next labourer's job that opened up with Sampson.

15. Waito was satisfied with this proposal, and Lewis agreed to it on behalf of the respondent union. At the time of the agreement, all concerned expected that Waito's recall to Sampson would occur within the next several months. Under the collective agreement, Sampson had the right (but not the obligation) to recall Waito by name, regardless of Waito's position on the list, at any time during the twelve months following the lay-off which Waito had challenged. The settlement created an obligation to recall Waito by name. That obligation was not limited in time, and the opportunity to fulfill it did not arise until November 1983 when the collective agreement right had expired. The existence or otherwise of recall rights was not an issue at the time of Waito's referral, however. As far as Lewis was concerned, he made the referral in accordance with the terms on which Waito's grievance had been settled.

16. Lewis referred Ronald Dauphin to work for Bird Construction commencing March 12, 1984 on a project involving the construction of a water treatment plant. Dauphin was not at the top of the out-of-work list. Lewis dispatched Dauphin to the job because he intended to and did appoint Dauphin steward on that job. Lewis anticipated (correctly, as it turned out) that jurisdictional disputes might arise between labourers and carpenters on this project, and he wanted to have a steward who was quite familiar with the jurisdiction claimed by labourers



on this type of project. In addition to his experience as a business agent in 1981, Dauphin had been steward on a number of projects, including the construction of water and sewage treatment plants in Elliot Lake. Again, while the complainants challenged the necessity of a policy that the best available persons be appointed stewards regardless of their position on the out-of-work list, and while they argued that others could have done an acceptable job or ought to have been given an opportunity to try, the complainants did not challenge the proposition that Dauphin was a good steward for this project.

17. In my decision of April 2, 1984, I recorded the reasons which the complainants' representative then said had prompted their filing this complaint:

... Mr. Bradley told the Board that the complainants want to get a set of rules with respect to the operation of the union's hiring hall. ... They feel that a detailed accounting of hiring hall operations is needed. They are not happy with the documentation available to them. They want documentation which would tell them who worked where on any particular occasion. They want to know what the classifications are which determine referrals. To this end, he said, the complainants want a directive from the Board just like the directive in the *Portiss* case ([1983] OLRB Rep. July 1160). Mr. Bradley explained that the rules and regulations governing the operation of the respondent's hiring hall have been under consideration by a committee of members and by the Executive Board of the respondent union. One of the complainants is a member of both the committee and the Executive Board. In the circumstances, the complainants feel that the Board's decision in this complaint would and should have a bearing on the question of what rules and regulations the Local Union should have in place.

It appeared then that the complainants misunderstood the Board's function, believing it to have some general jurisdiction to decide what rules ought to be followed in the operation of a hiring hall upon application of a member who is unhappy with the existing rules. It appeared this belief sprang from a reading of the result in *Joe Portiss*, [1983] OLRB Rep. July 1160, (1983) 4 Can. LRBR (2d) 69, without considering the unique circumstances which gave rise to that result. I observed then that:

... Record keeping obligations and inspection rights were imposed in the *Portiss* case in response to a demonstrated pattern of abuses and favouritism which had been able to flourish in a climate of secrecy maintained by the union's officers...

It is important to note that in *Portiss* the Board did not prescribe the rules by which referral decisions were to be made. It directed only that the union properly establish, and then follow, such rules. The Board's requirement that various lists be maintained and kept available for inspection by members was in response to what the reader will understand was an unusual situation. *The remedies imposed by the Board in the Portiss case do not represent a standard with which every trade union must in every case comply in order to satisfy its duty under section 69.* The language of the Board in the *Portiss* case makes that clear; the Board would not otherwise have described its remedies as "far-reaching". *The Board is not in the business of imposing hiring hall rules or dictating improvements to hiring hall administration*, as appears from the following passage from the Board's decision in *John Cooper*, [1984] OLRB Rep. Jan. 6:

40. This is not to say that we are entirely happy about the way in which the hiring hall is operated. The union's record-keeping procedures leave something to be desired and the heavy reliance on the [business manager's] memory creates a real potential for error. There may be up to 100 unemployed members on the list at any one time, and it will obviously be difficult for [the business manager] to remember the qualifications, preferences and circumstances of each one of them. An honest error may not be illegal but the union should still make every effort to reduce the potential for error and the possibility that members may *think* they have been dealt with unfairly. Unless the union's

hiring hall rules and the factors which [the business manager] takes into account are reduced to writing and regularly explained to the membership so that there can be no excuse for misunderstanding, suspicions are bound to arise fueling dissension in the Local and potentially costly and unnecessary litigation. Equally important, if members are not fully aware of the criteria which might support their claim for a job referral, they may fail to communicate their situation to [the business manager] and, in consequence, remain out of work longer than might otherwise be the case. However, *it is one thing to suggest that the system could be improved or that more effort should be made to educate the membership. It is quite another to suggest that the existing system, endorsed by the membership, is illegal, or that [the business manager] himself has acted improperly and in contravention of section 69 of the Labour Relations Act.* We do not think that the evidence supports either proposition.

[emphasis added]

The particular focus in those observations on the record keeping and information disclosure aspects of hiring hall administration was a response to what then appeared to be the complainants' concerns. While the apparent focus of their complaint shifted thereafter to the nine matters set out in their bill of particulars, it became apparent from the conduct of their case that they still thought the Board would, in effect, arbitrate their differences with the union's business manager, executive board and other members over what rules ought to govern the operation of the respondent union's hiring hall. The complainants' representative had to be regularly reminded that the complaint was limited to the matters outlined in the bill of particulars. Despite those repeated reminders, the complainants' representative consumed an inordinate amount of hearing time with questions about matters and issues which had little or no apparent connection with those raised by the complainants' bill of particulars, except as unnecessary background or as part of an unparticularized and entirely unsuccessful attempt to show that the complainants had been treated badly by Lewis or others of the respondent's officers. By way of example, the classifications set out in Article 10 of the Sault Ste. Marie local schedule to the ICI provincial agreement were the subject of questions asked of almost every witness: which of the listed qualifications did the witness have, how many constituted qualifications which would have been recorded against a member's name before the referral system was computerized, how many were actually recorded against that member's name, how had they come to be recorded, how did the business manager decide whether a member was qualified to be referred a job which required special skills, did the witness feel the number of special qualifications which could be recorded against a member's name under the computer program now used by the respondent was adequate, and so on. All this was pursued despite the fact that no-one, not even the complainants as it turned out, was suggesting that the way in which qualifications were ascertained or recorded had played any significant part in any of the circumstances complained of in the bill of particulars.

18. The complainants' misconception of the Board's role and jurisdiction in a complaint of this sort persisted to the end, and manifested itself in much of the argument made by their representative when the evidence finally concluded. This was particularly so in the argument about the referral of stewards.

19. In his evidence, Lewis explained that the welfare of the union and its members is directly affected by the union's ability to defend and, if possible, extend its work jurisdiction, to ensure employer compliance with the applicable collective agreement and to minimize work-site problems, because these matters all have an effect on the future quantity and quality of the work opportunities available to members. In his view, the steward on each job plays such



a critical role in all of these important matters that it is in the best interests of the union and its members that the selection of members for referral to a job be done with an eye to including among them someone with the best possible qualifications to act as steward on that job. That was how he justified his policy of sending the member best qualified as steward regardless of his position on the out-of-work list.

20. The complainants' representative argued, as he had with witnesses during his examination of them, that the purpose of the out-of-work list was to make a fair distribution of work opportunities on the basis of "seniority on the out-of-work list" and appropriate qualifications to perform the work required by the employer. He argued that a steward ought to be selected from those otherwise entitled to a referral to the job, and that the union ought to have a training program for stewards.

21. These arguments highlight the interests which must be balanced by a union which operates a hiring hall in determining the basis on which referral decisions will be made and the factors to be taken into account in making them. The trade union has a legitimate interest in maximizing the quantity and quality of its future work opportunities. From that perspective alone, it makes sense to send out only "the best": not only the best stewards, but also the best workers. The trade union also has a legitimate interest in ensuring that there is an equitable distribution of work opportunities among all those with the minimum qualifications for those opportunities. That perspective favours a rigid "first in, first out" system. Obviously, these interests conflict. Any set of hiring hall rules, procedures or guidelines will necessarily reflect a compromise which results from a balancing of those and other conflicting individual and group interests. From the perspective of the *Labour Relations Act*, the trade union is free to strike that balance as it sees fit, so long as it does not act in a manner which is arbitrary, discriminatory or in bad faith.

22. I must observe once more that neither section 69 nor any other provision of the *Labour Relations Act* gives this Board the power to arbitrate an internal disagreement over what rules ought to govern the operation of a hiring hall. Section 69 requires that a trade union like the respondent not act in a manner that is "arbitrary, discriminatory or in bad faith" in the operation of its hiring hall. A complaint under section 69 must focus on those quoted words and show that the behaviour complained of falls within them.

23. The referrals of Reynolds, Suppa and Dauphin were referrals made in accordance with the business manager's customary approach to the appointment of stewards. That approach has a rational basis. I am satisfied it has not been applied in a manner which is arbitrary, discriminatory or in bad faith, either in these referrals or any of the other instances referred to in evidence. Reynolds, Suppa and Dauphin were clearly well qualified in accordance with the objective criteria Lewis described. These referrals did not violate section 69 of the *Labour Relations Act*.

24. The referral of Barry was a departure from the rules Lewis ordinarily followed in making referrals and the same is true of Waito's referral, particularly if the settlement of his grievance is ignored or treated as irrelevant. That does not necessarily make either referral arbitrary, discriminatory or in bad faith. The context must be considered in each case. Asked what Lewis should have done in the context in which he decided to refer Barry, the complainants' representative said Lewis should have done nothing: he should have sent no-one. While this meant no unemployed member would get the work offered, this was preferable,



in the complainants' opinion, to making a referral from which Barry would get "recall rights." In Waito's case, the complainants' representative says Waito's grievance should have been pressed and Sampson should have been forced to layoff one of the other labourers it employed. While he acknowledges the union's right to settle grievances, he says the union cannot do so in a way which "hurts" other members. He says this settlement "hurt" other members because it resulted in an out-of-order recall beyond the ordinary 12 month limit on recall rights.

25. Acceptance of the complainants' submissions in Waito's case would effectively deprive unions of the power they must necessarily have to resolve disputes in an amicable manner. Disputes involving any one union or bargaining unit member will ordinarily have an impact on other members; so will settlements of such disputes. The impact of settlement will be different from that of pursuing the dispute; a settlement is made because its impact is considered preferable to that of pursuing the dispute. A settlement nearly always involves an *ad hoc* departure from what at least one interested party thought should be the result of applying the usual rules. That departure may well change the circumstances of other members of the union or bargaining unit. Ignoring the group interests in which individual members share, a settlement of one member's grievance can often be perceived as having some negative impact on another member or members. That is inevitable. The mere fact that a settlement made for one member in some way alters the rights actually enjoyed by others does not make the settlement a violation of section 69. I do not find either the Waito settlement or the referral which resulted from it to be a violation of section 69.

26. Even when it does not result from settlement of a grievance, a departure from ordinary rules will not necessarily constitute a violation of the duty to act in a manner which is arbitrary, discriminatory or in bad faith: see *Thomas Beck*, [1985] OLRB Rep. Jan. 14 and the decisions referred to therein. Lewis felt that he was entitled to depart from strict adherence to his ordinary practice when the circumstances warranted such action. He concluded they did in the case of Sampson's request for Barry. A discretion of this sort carries with it both the possibility of abuse and the potential for a more equitable and sensitive administration than could be possible with mechanical application of simple rules to unforeseen situations. The mere fact that such a discretion is exercised is not a breach of section 69. Once again, the question is whether the discretion has been exercised in a manner which is arbitrary, discriminatory or in bad faith. In the case of the request for Barry, Lewis faced a difficult problem. He was not obliged to bury his head in the sand. The factors he considered in dealing with the problem were relevant, and the conclusion he came to was rational. He was not influenced by any improper matter. His decision did not violate section 69.

27. Having spent eleven days hearing about what the complainants presumably regarded as the worst misconduct they could think of to complain about, I feel that one final observation will be in order. The members of Local 1036 have since 1973 entrusted Jimmie Lewis with the day-to-day management of the affairs of their local. They no doubt expected him to advance their collective interests to the best of his ability and to balance their individual interests in a fair and even handed manner. I heard nothing in those eleven days which would lead me to conclude that he has acted otherwise.

28. This complaint is without merit, and is hereby dismissed.

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**1807-85-R** Mike Tales, et al, Applicants, v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, Respondent, v. **Canadian Pacific Hotels Limited** (Red Oak Inn), Intervener, v. Group of Employees, Objectors

Petition - Practice and Procedure - Termination - Evidence before Board that termination petition not voluntary - Inquiry into voluntariness of counter-petition rendered irrelevant - Termination application dismissed

**BEFORE:** *Thomas S. Kuttner*, Vice-Chairman, and Board Members *F. C. Burnet* and *C. A. Ballentine*.

**APPEARANCES:** *Mike Tales* and *Randy Dupuis* for the applicants; *Bois Wilson*, *Janet Mosher*, *G. Pineo*, *P. Smith* and *M. Smith* for the respondent and the objectors; *Mary Gersht* and *Valerie Stibbard* for the intervener.

**DECISION OF THOMAS S. KUTTNER, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE;** February 18, 1986

1. This is an application pursuant to the provisions of section 57(2) of the *Labour Relations Act* for a declaration terminating the bargaining rights which the respondent holds with respect to the intervener employer's place of business in Windsor, Ontario, known as the Red Oak Inn. The provisions of sections 57(2) and (3) read in relevant part:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. In support of this application, the applicant filed a handwritten document dated August 27, 1985, bearing the signatures of 18 persons, 16 of whom are to be considered employees for the purpose of this application who have voluntarily signified in writing as of the date determined under clause 103(2)(j) that they no longer wish to be represented by the respondent. Given the size of the bargaining unit, that number of signatories to the petition would suffice to require the Board to exercise its jurisdiction under subsection 57(3) to order a representation vote, provided of course the Board is satisfied as to its voluntary nature.

3. However, there was filed as well before the Board, and prior to the terminal date set, a counter-petition dated September 9, 1985 containing the signature of 27 persons, 21 of

whom would be considered employees on the relevant date for the purposes of this application. Only a small number of employees signed both the original petition in support of this application and the counter-petition in opposition thereto - the total was six. However, that number would be sufficient, if the Board were satisfied that the signification in writing in the later document were such as to negate, cancel or withdraw that expressed in the earlier document, to reduce the evidence in writing originally filed in support of this application to below that level of 45 per cent of the employees in the bargaining unit stipulated in the statute as required for the further processing of this application by direction of a representation vote.

4. It has long been the policy of the Board when confronted with statements of desire in the form of petitions and counter-petitions in the same application, whether for the granting of bargaining rights in an application for certification or their withdrawal in an application for termination, to consider as the most reliable indication of the wishes of the employees, the last *voluntary* expression of those wishes as made in writing and filed prior to the terminal date of the application. See *Browning-Ferris Industries*, [1982] OLRB Rep. June 816 at para. 22; and *Baltimore Air Coil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 at para. 49. The practice of the Board in these cases is to inquire first into the circumstances surrounding the origination, circulation and filing of the counter-petition in order to establish its voluntary nature. If it meets the requirement of voluntariness, this will obviate the necessity of inquiring into the circumstances surrounding the original petition which would of necessity have become “stale” evidence, no longer the last expression of employees’ desires prior to the terminal date, whether voluntary or not.

5. In the instant case, the Board proceeded in accordance with its normal practice and first heard evidence with respect to the origination, circulation and filing of the counter-petition. Aspects of that evidence were such as to raise in the mind of the Board some doubt as to its reliability as representing the last voluntary expression of desire prior to the terminal date. The Board however did not make a ruling to this effect and chose instead to reserve on the matter, inviting the applicant to submit evidence as to the origination and circulation of the original petition filed in support of this application. That evidence was so fatal to the applicant’s case as to render it unnecessary for the Board to proceed with its inquiry as to the voluntary nature or otherwise of the counter-petition, and it declines to do so. The Board wishes to stress here that it is not departing from its earlier articulated policy and established practice of considering as the most reliable expression of an employee’s wishes his last voluntary expression of desire prior to the terminal date. Rather, the circumstances of this case are such that for the Board to proceed with that inquiry would serve no useful purpose inasmuch as the Board has before it evidence that, in any event, the original petition does not meet the statutory requirement that “(e)mloyees in the bargaining unit have voluntarily signified in writing ... that they no longer wish to be represented by the trade union ...”. Simply put, the character and nature of the counter-petition has become irrelevant for the purpose of these proceedings.

6. In support of this application, Mike Tales testified as to the origination and circulation of the original handwritten petition which is in the following terms:

We, the employees of the Red Oak Inn C. P. Hotels, do not want to be represented by “Hotel Employee Restaurant Employees” local 75.

The evidence adduced was flawed in a procedural sense and fatal to this application in a substantive one. In the procedural sense, the applicant failed to meet the requirements of Rule



73(5)(b) of the Board's Rules of Procedure which stipulate that oral evidence must be led with respect to the manner in which *each* signature on a statement of desire was obtained if its validity is not to be impugned. It may well be argued that the failure to adduce evidence with respect to certain signatures ought not to have an effect other than that these be discounted in the Board's deliberations of the matter. See *Pyrotenax of Canada Ltd.*, 60 CLLC 16,170; *Canadian General Electric Co.*, 61 CLLC 16,191; *Pitney-Bowes of Canada Ltd.*, [1967] OLRB Rep. Mar. 976. However, that argument is of no avail here, inasmuch as to discount the three signatures with respect to which no evidence was led would lead to a reduction of the number of employees whose signature does appear on the statement of desire to a level below the percentage of members of the bargaining unit whose voluntary signature is required for the Board to exercise its discretion and order a vote in a termination application.

7. The Board however is not content to rest its decision on this technical or procedural failing on the part of the applicant to adduce evidence as to the manner in which each signature of the petition was obtained. This is particularly so in light of the fact that there was some indication made by Mr. Tales during argument that, had he been aware of the strictness of this requirement, he would have and could have called evidence with respect to the obtaining of these three signatures from a fellow employee present at the hearing. However, even had such evidence been before the Board, it could not have had any impact on the outcome of these proceedings. For, as noted earlier, the manner in which this petition originated and was later circulated was fatally flawed in a substantive sense, such that it fails completely to meet the Board's requirements as an expression of the voluntary wishes of the employees who are signatory to it. The Board wishes to stress this point, for it does not wish to leave the applicants in general and Mr. Tales in particular with the impression that, but for a procedural or technical irregularity in the adducing of evidence, this application would have been granted. Far from it, as we shall see.

8. What were the circumstances surrounding the origination and circulation of this petition? Mr. Tales testified that he first saw the petition on or about August 20, 1985 when he met in the coffee shop situated on the premises of the employer with the waitress who had initially drafted it. At that time the petition was undated and had the signature of one person on it. Tales agreed to help her circulate the petition among fellow employees and received it from her for that purpose. Tales himself had no knowledge of the manner in which to proceed on an application for termination. However a close friend of his had studied industrial relations in a university course and Tales determined to seek his advice. That friend was Steven Fall, the husband of Laura Fall who occupies the position of kitchen manager at the Red Oak Inn. It is common to the parties that Laura Fall occupies a managerial position, although of minimal rank, and is a person who, because she exercises managerial functions, is excluded from the bargaining unit by reason of section 1(3)(b) of the Act. Tales described himself as a "good friend" of the Falls and testified that his friendship with Laura Fall was well known at the work place.

9. Shortly after having obtained the petition itself, Tales approached Laura Fall in the hotel kitchen and advised her first that he was "tired of what was going on" with respect to the union and secondly that he wanted to start a petition against it. Laura Fall advised him to speak to her husband and that he would help him. This conversation took place in the presence of several employees, and the signature of two of these appear on the petition. Tales considered Laura Fall to be nothing but a go-between who would make arrangements for him to speak with her husband, and he could not recall speaking to her subsequently with respect

to this matter. On the other hand, he knew of one other employee whose signature appears on the petition with whom Laura Fall had spoken about the matter.

10. Tales did not meet with Steven Fall until one to two weeks after his initial meeting with Laura Fall in the hotel kitchen. He did however commence circulating the petition initially after his discussion with her, and by September 6th he had obtained the signatures of approximately 10 to 12 fellow employees. These signatures were all obtained off of the employer's premises and at the homes of the various signatories. On or about September 6th Tales met with Steven Fall at the home of the latter. It would appear to have been a social visit inasmuch as Tales was accompanied by his girlfriend who was entertained by Laura Fall in the living room of the Fall's residence while Tales and Steven Fall discussed the petition in the kitchen. It was at this time that Steven Fall advised Tales that he should get in touch with the Board in order to obtain forms for the filing of an application for termination. Tales had taken the petition with him to the Falls' home and although he did not show it to Laura Fall, it was shown to her husband. The remaining signatures were obtained subsequent to that meeting. However, with respect to the great bulk if not all of the signatures which Tales obtained, he advised the employees' signatory that he was receiving assistance from Steven Fall in the filing of the petition with the Board.

11. For the Board to exercise its jurisdiction under section 57(3) and order a representation vote, it must be satisfied that the requisite number of employees has *voluntarily* signified in writing at the appropriate time that they no longer wish to be represented by the trade union. It is true that the Board is less inclined in termination applications to draw inferences adverse to the voluntariness of the statement filed in support of an application for termination. This is because that element of the sudden and otherwise inexplicable change of heart which characterizes a petition filed in certification proceedings, where an employee has within a very short span of time indicated first support for and then repudiation of a trade union, is absent in termination applications which arise at the earliest one year after a trade union has obtained bargaining rights. See *N. J. Spivak Ltd.*, [1977] OLRB Rep. July 462. Nevertheless, voluntariness remains the touchstone in a section 57 application for termination and here as always the Board must be "[s]ensitive to the particular vulnerability of employees arising from their dependent position in the employer-employee relationship" and "[e]specially scrupulous in its concern to protect the right of those [employees] to make their own choice, as distinct from that of their employer, in the matter of trade union representation ...": *A. R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911.

12. Here, there can be little doubt that the Board must reject the petition as a voluntary expression of the employees' desires as to trade union representation. Even if Laura Fall was acting without the consent or authorization of senior management (and indeed the indications are that she acted independently), nevertheless her status is such as to bring into play as between herself and the members of the bargaining unit that element of vulnerability so characteristic of the employer/employee relationship. It is clear that the employer through Laura Fall was involved from the earliest stages with this application for termination. It was she who advised Mike Tales that he could seek the assistance of her husband, and this in the presence of several employees. Her continued interest in the circulation and filing of the petition is evident both in the meeting which she helped to arrange between her husband and Mike Tales and in discussions which she is known to have had with at least one other member of the bargaining unit who signed the petition. Tales, whose relationship of friendship with Laura Fall was well known to members of the bargaining unit, made a point of advising those



among whom he circulated the petition that it was the assistance of her husband that he was receiving in the handling and filing of this application. All of this evidence leads the Board to conclude that the employees signatory to the petition, if not actually aware of the involvement of a member of management in its origination and its circulation, would reasonably suspect such involvement and in either case be concerned that management would become aware of a decision as to whether to sign it or not. See *Radio Shack*, [1978] OLRB Rep. Nov. 1043. The Board cannot accept the petition as a voluntary one.

13. Accordingly, for all of the foregoing reasons, this application is dismissed. The applicant has failed to establish that not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing as of October 29, 1985, the terminal date set pursuant to clause 103(2)(j) of the Act, that they no longer wish to be represented by the respondent trade union.

#### **DECISION OF BOARD MEMBER F. C. BURNET;**

1. My colleagues' decision is based on two assertions—first, that the petition from the applicants fails because sworn evidence in respect to witnessing three signatures was not provided; and in any event, that the petition was tainted by management association. I dissent on both of these findings.

2. The witnessing evidence in question was not given solely because the petitioner, Mike Tales, was unaware until the very end of the hearing that the Board rule applied to every name. He had in fact such evidence available in the person of a fellow employee who said he had signed up the three, and who indicated his willingness to so state under oath. All of this came to light at the end of the hearing after closing argument had been concluded by all and in the few minutes prior to adjournment. There was no doubt that the evidence was available and that the defect was procedural and technical and entirely due to the inexperience and unfamiliarity with Board procedures of an individual employee suppliant who was not professionally represented.

3. The Board has allowed deviations from strict rules of procedure in deference to laymen appearing before it. Not to do so now would I think, allow procedure to defeat the fundamental purpose of the Act, which is to give effect to employee wishes in the selection of their bargaining agent. Noting the circumstances and particularly the complete absence of any contrary suggestion that the signatures were not properly secured, I would allow and accept all signatures.

4. Regarding the question of taint, Mr. Tales sought guidance from a non-employee who was a close friend and a student of industrial relations. It is quite incidental that his friend's wife was a junior member of management or even that she suggested the contact to Mr. Tales. She did not venture any encouragement or discouragement or any discussion of merits or preferences. To suggest that the simple act of directing an employee to a source of outside assistance, on the initiative and at the request of the employee, and without encouragement or instigation on the part of the employer constitutes "taint" is not in accord with the realities of the work place—and most particularly when such response comes from a junior member of management in the ordinary course of casual and daily employee contacts. The Board must be alert to improper employer influence in these events, but should not ascribe conspiratorial motives to ordinary and natural exchanges at the interface between first-line



supervision and employees, nor such easy susceptibility of most employees to perceived management wishes, whether accurate or not.

5. Moreover, there was a suggestion in evidence that the origin of the petition lay in employee dissatisfaction with the incumbent union and the petition contemplated replacing it but not going non-union; and it was further alleged that management was opposed to any such change. This prompted management counsel to object and to assert its neutrality. If the management protestation in this respect is accepted as I think it should be, then it means that it is indeed neutral and the allegation of taint fails; and if the protestation is not accepted, then it means management favours the respondent union and the allegation of “taint” likewise fails in respect of the applicant petition.

6. I would accept the petition and order a vote.

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**0243-84-U Canadian Pneumatic Control Contractors Association, Complainant, v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Mechanical Contractors Association of Ontario, Respondents**

**Construction Industry - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Pursuit of agreement other than provincial agreement breach of bargaining duty and s.146(2) - Provisions of union constitution no defence against requirements of Act - Board directing inclusion of appendix in agreement**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *H. Kobryn* and *J. Wilson*.

**APPEARANCES:** *Brian P. Smeenk*, *Clifford A. Hepburn*, *Al P. De Wachter* and *Wm. J. Scrafton* for the complainant; *Alex Ahee* and *G. Meservier* for the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; *G. Grossman* and *H. J. Buchmueller* for the Mechanical Contractors Association of Ontario; no one appearing for the Ontario Pipe Trades Council.

**DECISION OF THE BOARD;** February 19, 1986

1. The complainant has complained that it has been dealt with by the respondents contrary to the provisions of sections 15, 146 and 151 of the *Labour Relations Act*. In a decision dated October 12, 1984, the Board made the following direction:

20. Having regard to the foregoing and pursuant to the remedial provisions of section 89(4) of the *Labour Relations Act*, the Board determines and directs that:

I The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting

Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency by refusing to continue to bargain respecting the proposals of the Mechanical Contractors Association of Ontario as the Employer Bargaining Agency for an appendix to the current provincial collective agreement (covering journeymen and apprentice plumbers and pipefitters) respecting employers (and their employees) which perform pneumatic control installation work in the industrial, commercial and institutional sector of the construction industry have contravened section 15 of the *Labour Relations Act*;

- II The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith cease and desist from their contravention of section 15 of the *Labour Relations Act*;
- III The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency by insisting upon negotiating a separate pneumatic control collective agreement on a national basis have attempted to bargain for employees represented by affiliated bargaining agents for other than a provincial collective agreement have contravened section 146(2) of the *Labour Relations Act*;
- IV The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith cease and desist from their contravention of section 146(2) of the *Labour Relations Act*.
- V The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada as the Employee Bargaining Agency shall forthwith return to the bargaining table and bargain in good faith with the Mechanical Contractors Association of Ontario as the Employer Bargaining Agency over the inclusion of the proposals contained in the letters dated February 1 and 29, 1984 (referred to in paragraphs 10 and 11 in this decision), in an appendix as an amendment to their current collective agreement.

2. On October 24, 1984, the Board received the following letter:

Your October 16, 1984 letter attached to the Board Decision has been received.

Please be advised that the writer on behalf of the United Association cannot accept any decision which causes a violation of the Constitution of the United Association namely Sections 203 and 229 of the U.A. Constitution (copies enclosed herewith). The United Association is prepared to negotiate all the provisions mentioned in the Board's report except the two provisions mentioned above. As the senior U.A. Officer in Canada I shall not place myself in a position of losing my job even if it causes incarceration of the writer.

The case at hand is a ploy to force our organization to violate Sections 203 and 229 of our Constitution which we shall not do.

Our Local Union cannot violate Sections 203 and 229 and the only exceptions to the above rule was established by convention action which allows our General President to waive Sections

203 and portions of 229 while negotiating a National Control Agreement. Should the writer or our Local Unions ever ignore the provisions of Sections 203 and 229 with any local or provincial organization of employers it would only brush off on other sectors of our industry. We shall not allow our plumbers, pipefitters and welders to use their personal cars to transport the employer's tools and materials.

It should be clearly understood that the I.C.I. Sector of work covered by the National Pneumatic Control Agreement covers less than 20% of the work performed by the Pneumatic Control Companies. More than 80% of the work performed by our Pneumatic Control Mechanics involves mainly service work and a much smaller degree of Residential and Power Sector work.

Even though the I.C.I. Control work is adequately covered in the I.C.I. Sector Agreement without change, we are prepared to negotiate any change or addition to the I.C.I. Sector Agreement except the two provisions covered by our Constitution in Sections 203 and 229.

Should the Mechanical Contractors Association not agree to meet on that basis there shall be no meeting.

Yours very truly,

“J. R. St.Eloi”

J.R. St. Eloi,  
Director of Canadian Affairs, U.A.

3. This complaint was listed for hearing for the purpose of hearing the evidence and representations of the parties on (a) the date of the adoption of and inclusion in the constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (the “International”) of sections 203 and 229, (b) the terms and date of the waiver by the convention and/or the General President relating to sections 203 and 229 of the constitution of the International, (c) the inclusion, if any, in any past or current National Control collective agreement of the proposal referred to in paragraph 20V of the decision of the Board in this matter dated October 12, 1984.

4. Section 203 and the relevant part of section 229 state:

SEC. 203. The use of vehicles of any description (unless furnished by the employer) will be discontinued by the members of the United Association during working hours, and the Locals of the United Association shall be and are hereby empowered to legislate locally against further use of the same.

SEC. 229(b) There shall be a card known as a travel card issued by the Financial Secretary (or officer designated by him) of the Local Union only to Building Trades journeymen members fulfilling the conditions prescribed by subsection (c) of this section, who desire to travel from one Local Union to another in search of employment. Travel cards shall be furnished to the Local Unions by the General Office and shall be in such form as the General Secretary-Treasurer, with approval of the General Executive Board, shall prescribe. Any Building Trades journeyman member shall obtain a travel card from the Local Union in which he holds membership from the Local Union in which his travel card is deposited before traveling to another Local Union. On leaving the jurisdiction of a Local Union a member may, in accordance with subsection (j), request a Local Union other than his home Local Union to mail a travel card to him at the address indicated by him and the Local Union shall comply with such request promptly.



Upon issuance by his home Local Union, each travel card form shall be signed by the member who receives it in the presence of the officer issuing the same unless a waiver of this requirement is granted by the General Executive Board.

The General Officers, with the approval of the General Executive Board, are authorized to modify the form of travel card in use and waive any of the procedural requirements of this section which become unnecessary as a result of such modification.

5. At the hearing the parties in attendance were represented by counsel. None of the parties called evidence on the matters set forth in the decision of the Board dated November 20, 1984. However, the parties through their counsel did offer certain facts which were not challenged. The International informed the Board that section 203 was introduced into the constitution in 1896 when the prohibition initially referred to bicycles. By 1957, the prohibition had been changed from bicycles to vehicles. The clauses which the Mechanical Contractors Association of Ontario (the "MCAO") has proposed as an appendix to the provincial collective agreement have been in effect as part of the service and maintenance collective agreement between the Canadian Pneumatic Control Contractors Association (the "CPCCA") and the International for the ten year period preceding 1982. It appears that in 1957 the issue regarding the use of automobiles and travel cards was resolved when the general officers of the International were authorized to modify the form of travel card in use and waive the procedural requirement involved.

6. It appears to the Board that the parties thereto have been working under the CPCCA collective agreements for ten years and that these collective agreements have contained the provisions which Mr. St.Eloi objects to. Moreover, counsel for the International has informed the Board that these provisions have been waived by the general officers as provided for in the constitution with respect to the CPCCA. There was no explanation before the Board as to why a provincial collective agreement in Ontario is in this regard qualitatively or quantitatively different from the CPCCA collective agreement which was national in scope. In any event, while the constitution governs the internal affairs of a trade union, a trade union may not by virtue of the provisions of its constitution contract out of the provisions of the *Labour Relations Act*. See *Alexander Barna*, [1981] OLRB Rep. July 815. More specifically in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583, the Board held that an international's constitution and by-laws did not provide either it or one of its local trade unions with an acceptable defence in refusing to execute a collective agreement. An international's constitution and by-laws are subject to the provisions of the *Labour Relations Act* and any conflict must be resolved in favour of the Act in the circumstances of this complaint.

7. The events which give rise to the decision of the Board dated October 12, 1984, initially began in 1982, when the MCAO sought an order to compel members of the CPCCA to cease and desist from performing work in the industrial, commercial and institutional sector of the construction industry in Ontario during the currency of a strike in the plumbing and pipefitting industry. In *Honeywell Controls Ltd.* [1983] OLRB Rep. May 641 a differently constituted panel of the Board in a decision dated May 25, 1983, determined:

- I The members of the CPCCA were subject to the MCAO's designation as the employer bargaining agency in the plumbing and pipefitting trade in the industrial, commercial and institutional sector of the construction industry and that the MCAO owed a duty of fair representation to its constituent employers and would have to be sensitive to possible conflicts of interest among such employer.

- II The terms of the National Pneumatic Controls Agreement, between the CPCCA and the International was null and void, in so far as it purported to cover the industrial, commercial and institutional sector of the construction industry. This determination, however, was declared not to be effective until the expiration of the current provincial collective agreement unless the MCAO was willing to adopt the relevant provisions of the said collective agreement as an appendix for the remainder of the current provincial collective agreement.
- III The parties ought to be given an opportunity to deal with the issues arising from the integration of the relevant provisions of the said collective agreement into the provincial collective agreement.

The Board indicated that a method of accommodating the interests of members of the CPCCA could be by including the relevant provisions of the National Pneumatic Controls Agreement as an appendix to the provincial collective agreement.

8. In the instant complaint the CPCCA has filed a complaint under section 89 of the Act arising from the refusal of the employee bargaining agency to negotiate any terms of the appendix which had been referred to by the Board in the decision in *Honeywell Controls Ltd.* In its decision in this matter dated October 12, 1984, the Board made the determinations and orders referred to in paragraph one herein. The Board is satisfied that the MCAO and the CPCCA have made every reasonable effort to comply with the decision of the Board in *Honeywell Controls Ltd.* On the other hand, the employee bargaining agency through Mr. St.Eloi has refused even to meet with the MCAO and/or the CPCCA to discuss any provisions relating to the use of vehicles and mobility provisions involving travel cards - two of the most significant and important provisions contained in the National Pneumatic Controls agreement which the CPCCA seeks to have included in an appendix to the provincial collective agreement. Mr. St.Eloi has disregarded the decision of the Board in *Honeywell Controls Ltd.* and the direction of the Board referred to in paragraph one and insists that these provisions may only be adopted within a National Pneumatic Controls Agreement and not as an appendix to a provincial collective agreement. The Board finds that the International and the Ontario Pipe Trades Council (which constitute the employee bargaining agency) have continued to contravene sections 15 and 146(2) of the Act.

9. The complainant has requested, in view of these continued flagrant violations of the Act, that the Board order that the MCAO and the employee bargaining agency include an appendix to the current provincial collective agreement the relevant provisions of the National Pneumatic Controls agreement as referred to in the decision of the Board dated October 12, 1984.

10. The Board has in the past made orders requiring a party to sign a collective agreement, see for example, *The Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. June 507; *Wilson Automatic (Belleville) Ltd.*, [1980] OLRB Rep. Sept. 1337; *Fotomat Canada Limited*, [1981] OLRB Rep. Feb. 145; and *Treco Machine & Tool Limited*, [1982] OLRB Rep. Dec. 1954. The Board has long recognized the principle of voluntarism in collective bargaining and has, in providing relief for violations of section 15, generally avoided imposing a collective agreement upon an unwilling party. See *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309. However, the Board has considered both the conduct of parties and the stage of the negotiations and to the degree to which the parties have themselves reached agreement on the terms of a proposed collective agreement. Thus in

*Wilson Automotive (Belleville) Ltd.*, an employer requested that the trade union, which had accepted the employer's offer, conduct a ratification vote. The Board held that the employer had no right to request such a vote and directed the employer to sign a draft collective agreement. In *The Municipality of Casimir, Jennings & Appleby*, the Board ordered an employer and a trade union to sign a document, which had been prepared as a collective agreement, by placing thereon the signatures of their authorized representatives. Similarly, in *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688, the Board ordered an employer to execute the proposed collective agreement which reflected the memorandum of settlement which had been reached between the employer and the trade union.

11. In the instant complaint the Board notes that the appendix was negotiated among the parties to the provincial collective agreement and was ready for signature before Mr. St.Eloi instructed that it not be signed. The Board notes that it was the same language which had been included in the National Pneumatic Controls agreement. The conduct of Mr. St.Eloi in unilaterally repudiating an agreement which had been negotiated and which contained such language underlines the violation of sections 15 and 146(2) by the employee bargaining agency.

12. The bargaining which occurred between the parties was the result of a direction by the Board and Mr. St.Eloi had not complied with any of the Board's directives. As stated earlier, the provisions of the constitution which were raised by Mr. St.Eloi are not a defence to signing the appendix. After the last hearing of the Board Mr. St.Eloi requested an opportunity to address the Board. This request came after the hearings had been concluded. Mr. St.Eloi has been given every opportunity to call evidence and to make representations before the Board. In these circumstances, the Board is not prepared to allow Mr. St.Eloi yet a further opportunity to do what he had an ample opportunity to do on earlier occasions.

13. Having found that the employee bargaining agency has breached the duty to bargain in good faith, the Board hereby orders the employee bargaining agency to include in the current provincial collective agreement and execute the appendix which is attached within seven days of its having been prepared, executed and presented to the employee bargaining agency by the MCAO.

(Appendix omitted: Editor)

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**0917-85-OH Theresa Russ, Elaine Jennings, Kelly Shields and Carole Matthewson, Complainants, v. Cody's Stores Ltd., Respondent**

**Health and Safety - Odour from stock of wallpaper causing discomfort - Whether refusal to work proper exercise of rights - Whether inspector's finding that work safe denying workers protection - Whether failure to recall or discharges unlawful**

**BEFORE:** *Lita-Rose Betcherman*, Vice-Chairman, and Board Members *F. C. Burnet* and *B. L. Armstrong*.

**APPEARANCES:** *Theresa Movre (nee Russ)*, *Elaine Jennings*, *Kelly Shields*, *Carole Matthewson* and *John Cheeseman* for the complainants; *Keith Cody* for the respondent.

**DECISION OF LITA-ROSE BETCHERMAN, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; February 24, 1986**

1. The complainants allege that the respondent violated section 24 of the *Occupational Health and Safety Act* (OHS Act) by disciplining and penalizing them for exercising their rights under section 23 of the Act. The relevant clauses are as follows:

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

• • •

(b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or

• • •

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of,

(a) a committee member who represents workers, if any;

(b) a health and safety representative, if any; or

(c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

(b) the physical condition of the work place or the part thereof in which he works continues to be likely to endanger himself; or

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause 4(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the work place or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his work station during his normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the work place or the part thereof which is being investigated unless the worker to be so assigned has been advised of the refusal by another worker and the reason therefor.

24.0 (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker.

because the worker has acted in compliance with this Act or by the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

2. The respondent operates a retail and wholesale business in Hamilton dealing in paints and wallpaper. A store with offices and a warehouse is on the premises. The four complainants were employed in the shipping and receiving department located on the main floor of the warehouse.

3. Early in May 1985, the respondent received two shipments of wallpaper from Italy.

Although previous shipments of the Italian wallpaper had not caused problems, an odour emanated from these last two shipments and there is no dispute that most warehouse workers were complaining about it. The complainants testified that they were feeling ill from the odorous wallpaper and, in fact, went to see their doctors on May 23 and 24. The evidence shows that management witness Krista Fruck also visited her doctor on May 23rd. The complainants testified that they were worried about possible harmful effects from the substance.

4. On Thursday, May 23rd, the complainants told their supervisor, Linda Bird, and the foreman, a Mr. Somani, that the odour was causing them headaches and nausea. It seems that Mr. Somani opened the doors and windows but the complainants closed them claiming it was too cold. Complainant Matthewson then called the Ministry of Labour seeking advice on how to deal with the situation. She was informed of her rights under the *OHS Act* and was advised to file a formal complaint with management. Matthewson and her supervisor, Linda Bird, then called the office manager, a Mr. Braun, who was in charge while the owners Mr. and Mrs. Cody were in Calgary. According to Matthewson, Braun told them that they were worrying about nothing and “should stick their heads out the door.” She also testified that she listened in on a later telephone conversation in which Braun told Bird to stop wasting time and to get back to work. The evidence is unclear as to the timing of the visit, but there is no doubt that an inspector from the Industrial Health and Safety Branch of the Ministry of Labour visited the work place and talked to Braun and Somani in the presence of Bird and Matthewson who represented the employees. The inspector informed both managers about the rights and obligations of employers and employees under the Act and cautioned them about taking reprisals against employees who exercised their rights. Neither Bird, who is no longer employed by the respondent, nor Braun or Somani testified at the hearing. In the absence of testimony from the two managers involved in the work refusal, the Board accepts the complainants’ version of events.

5. Although the premises were aired out overnight on instructions from Mr. Cody in Calgary, all witnesses agree that the odour was still evident on Friday, May 24th. It was Matthewson’s day off, but at approximately 8:00 a.m. Russ and Jennings arrived for work. They asked Somani if anything was being done about the odour. He replied that they had telexed Italy for information, which would take several weeks to arrive, and that nothing would be done until then. Russ and Jennings handed in medical notes stating that they were to avoid exposure to the wallpaper, asked for alternate work, and, on being told by Somani that there was none, refused to work in accordance with the Act. Somani sent Russ and Jennings home. When Shields reported for the afternoon shift, she too handed in a medical note and put in a work refusal. Somani assigned her to work in the office. Around the same time, Somani recalled Russ and Jennings to work in the office as well. At 4:30 p.m. however, he informed the complainants that he had spoken to Mrs. Cody who had given instructions that they were to go back to the warehouse or to go home. On behalf of the complainants, Russ called the Ministry and at 5:30 p.m. an inspector from the Industrial Health and Safety Branch arrived. The latter again reviewed the Act with management and warned against reprisals.

6. On Monday, May 27, complainant Matthewson reported for work at 8:00 a.m. She handed in a medical note, and, on being informed that no alternate work was available, she too refused to work.

7. At 11:15 a.m. on the 27th, the inspector arrived with officials from the Occupational Health Branch who proceeded to assess the air quality in the warehouse. The tests were conducted in the presence of Braun, Somani and the complainants, Russ, Jennings and Shields.



8. On completion of the inspection, the inspector found that the respondent has contravened section 23 of the Act and issued an interim order to the employer stating that, pending the final results of the air sampling tests, "approved organic vapour respirators shall be worn by the refusees while working in the warehouse and shall be provided for other workers who wish to use the respirators." This order was to be complied with forthwith.

9. The complainants asked Braun if they should phone in every day to find out when the respirators were in. They testified that Braun said, in effect, "Don't call us, we'll call you." The uncontroverted testimony of the complainants was that they were not called.

10. On May 30th, the complainants came to pick up their pay cheques and had a conversation with Mrs. Cody. What was said during this conversation is in dispute. The complainants all testified that Mrs. Cody deeply resented their refusing to work and told them she would fire them if she could. They testified that she showed them one respirator but did not ask if they wanted to wear it. They further testified that she told them they were to remain off work until the final report was received. In reply evidence, Mrs. Cody agreed that she was very upset by the refusals because she felt that the complainants should have spoken to her before calling the Ministry. She freely admitted telling them that she would fire them if she could; however she claimed that she said they could come to work anytime but they would have to wear respirators. She acknowledged commenting to the complainants, "Maybe you want to wait until the results are in." Mrs. Cody testified that on May 31st, the inspector called her to say that respirators would no longer be necessary. She stated that she felt no obligation to convey this information to the complainants since she knew them to be in daily communication with the Ministry.

11. Krista Fruck, a warehouse employee who testified on behalf of the respondent, stated that she overheard Mrs. Cody tell the complainants that they could come back if they would wear masks but that they had refused to do so.

12. Mr. Cody also testified that he overheard the May 30th conversation. According to Mr. Cody, his wife told the complainants that they could not be fired and that they could come back to work whenever they wished. Mr. Cody denied that Mrs. Cody said they were to wait until the final report came in. When asked why only one respirator had been purchased in compliance with the interim order, Cody said they felt the complainants might not want to wear them. He agreed that the respirator was disposable after one wearing. Mr. Cody acknowledged that while the complainants were off work, two new warehouse employees were hired.

13. Russ testified that she telephoned the Ministry daily to find out if the final report was ready. On June 12th she found another job and quit her employment with the respondent.

14. Jennings testified that on June 12th she called Cody to find out if she would be paid for the time she was not working. Cody told her that she and the other complainants could have returned at any time after May 30th and since they had not done so they were not entitled to pay.

15. Jennings notified Matthewson and Shields of her conversation with Cody and she and Shields reported for work on June 13th. Shields testified that Mrs. Cody told her that

more Italian wallpaper would be coming and that "if we didn't like it we should quit." Shields also testified that Mrs. Cody told them that there would be no more personal time off and that henceforth rules would be strictly enforced. In her reply evidence, Mrs. Cody did not deny these statements.

16. Matthewson did not report for work until June 19th, allegedly because of doctors' appointments. However, she did not deny Mrs. Cody's charge that she had been expected to come back on June 15th but had not reported in or telephoned.

17. On June 19th the inspector delivered the final report to the respondent. The report stated that the conditions which caused the work refusals "would not be hazardous to nearly all workers." It went on to say that some individuals are more sensitive to low concentrations of formaldehyde than others. The interim order requiring respirators was rescinded, but the respondent was advised that they should be provided for any employees who wished to wear them. The report also stated that if new shipments of the odorous wallpaper were received, air sampling results would be needed. The inspector reminded the Cody's about the prohibition on reprisals.

18. On June 20th both Matthewson and Shields received letters of dismissal with two weeks' notice. Matthewson had worked for the respondent for four years, both full-time and part-time; Shields had worked for about three years. At the time of their dismissals, Matthewson was working part-time. Shields had been working full-time for about five months but the respondent was aware that she was planning to go back to school in September.

19. Jennings, the only complainant still working for the respondent, testified that she was being harrassed by the Codys with written warnings whereas she had never received any in the past. The warnings allege personal telephone calls on company time, rudeness to other employees, the use of unauthorized foot wear, and unreasonable scheduling demands.

20. The Codys testified that Shields and Matthewson were let go because of a decision to eliminate part-time employees in the warehouse. They stated that this decision had been made in March, 1985. Cody admitted that he had not asked either woman if she wanted to work full-time.

21. In his own defence, Mr. Cody argued that steps had been taken to get rid of the odour by airing out the warehouse and that the action of the complainants in closing the doors was evidence of a conspiracy to get time off with pay. This argument fails because of uncontroverted evidence that all four complainants asked for alternate work. Mr. Cody's main argument, however, was that they could have come back anytime after May 30th but chose to remain off work. He argued that the results of the tests showed that the complaints were pure fabrications. Finally he argued that the dismissals were not in the spirit of reprisal but represented a change of policy contemplated long before the work refusals for business reasons.

22. On behalf of the complainants, Mr. Cheeseman argued that it was up to the respondent to recall the complainants to work in accordance with the interim order. He submitted that the complainants' evidence as to the May 30th conversation should be preferred over Mrs. Cody's. He pointed out that they returned to work as soon as Mr. Cody said they could. He also used the factual circumstances to illustrate how the respondent had failed to comply with section 23 of the Act.

23. Section 23 of the Act gives the worker the right to refuse work which she reasonably believes to be unsafe and Section 24 protects her from reprisals for so refusing. To invoke the protections of the Act, the worker must satisfy the Board (a) that in her initial refusal to work, she had reason to believe that the work was unsafe, and (b) that following an employer investigation she had reasonable grounds for continuing to refuse to work.

24. There is no doubt that a bad odour emanated from the Italian wallpaper shipment. This was testified to by all witnesses and acknowledged by Mrs. Cody. It is also clear on the evidence that the odour was causing considerable discomfort to many if not all workers in the warehouse. The fact that the respondent's witness, Krista Fruck, went to her doctor on May 23rd indicates that not only the complainants were feeling ill enough to seek medical opinion. Even after airing out the warehouse overnight, the evidence shows that the odour continued on Friday, May 24th. In the face of the universal discomfort caused by the odour, the Board finds that the complainants had reason to believe that the odour represented a danger to themselves when they refused to work on May 24th.

25. The Board further finds that the complainants had reasonable grounds for believing that the odour continued to be dangerous after reporting the circumstances of their refusal to the managers in charge. Nothing was done to alleviate their worry. There was uncontroverted evidence that Mr. Braun simply told them to stop wasting time, and Mr. Somani advised them that, apart from telexing Italy for information which would take several weeks to arrive, nothing further would be done. At 4:30 p.m. they were confronted with the option of returning to the warehouse or going home. Since no measures were taken by management following their initial refusal, they obviously had no reason to alter their opinion. The complainants quite properly took the next step which was to call in an inspector.

26. That the complainants' opinion was not unfounded is confirmed by the inspector's interim order to the employer, issued on Monday, May 27th, to forthwith provide the complainants with respirators and that the same be made available to other warehouse employees.

27. It is irrelevant that the report issued on June 19th found that the substance in question was not harmful for most workers. The legislation states that a work refusal is legitimate where the employee's belief that she is unsafe is reasonable. The Board is satisfied that, at the time of their refusals, the complainants had reasonable grounds for believing that their work place was unsafe. Consequently, the complainants are protected by the Act, as guaranteed by section 24.

28. Section 24 of the Act prohibits an employer from disciplining, penalizing or intimidating employees for exercising their rights under section 23. Moreover, subsection (5) of section 24 places the onus upon the employer to prove that there were no reprisals. Complainants Shields and Matthewson allege that their dismissals on June 19th were in reprisal for their work refusals. Complainant Jennings alleges that as a result of her work refusal she suffers harassment on the job from management. Matthewson and Shields claim compensation for the period from their termination to the time they secured new employment on August 5 and July 12 respectively. All four complainants claim compensation for wages lost during their work refusal and for the three days of Board hearings.

29. The Board is unconvinced by Mr. and Mrs. Cody's testimony that Shields and



Matthewson were discharged as a result of a change in policy to full-time workers only in the warehouse. The use of part-time workers in the warehouse dated back to 1982 and there was no evidence, other than their self-serving testimony, that Mr. and Mrs. Cody had contemplated such a change prior to the work refusals. Neither Shields nor Matthewson were offered full-time jobs although both had experience working full-time. The hiring of two new employees suggests that the respondent intended to replace them. As well, Mrs. Cody's admitted statement on May 30th that she would fire them if she could is evidence of intent to take reprisals. The timing of the dismissals is also significant. It is clear that the Codys erroneously took the results of the test to mean that there was no substance to the work refusals. The report was issued June 19th. It is hard to avoid the conclusion that the dismissal letters of the same day reflected the Codys belief that they could now safely discharge the two complainants. The Board finds a causal connection between the work refusals of Shields and Matthewson and their dismissals on June 19th.

30. It is the finding of the Board that the dismissals of Kelly Shields and Carole Matthewson were the direct result of their legitimate work refusals and hence a violation by the respondent of section 24(a) of the Act.

31. Not only does section 24 prohibit an employer from disciplining a worker for exercising rights under section 23, but it also prohibits imposing a penalty upon or intimidating or coercing a worker.

32. The four complainants were off work without pay from the time of their work refusals, made pursuant to the Act, until Mr. Cody gave the signal on June 12th that they could come back. On May 27th the inspector issued an interim order to the respondent which would have allowed for the complainants' return to work.

33. The Board wishes to stress that it was an "Order to the Employer" and that the onus was on the respondent not on the complainants to carry it out. Had the complainants refused to wear respirators, they would then have been in breach of section 17 of the Act but there was no evidence of such a refusal. Having regard to the inspector's interim order of May 27th, the Board finds that the respondent should have recalled the complainants to work as soon as respirators could reasonably have been obtained. This obviously could have been done by May 30th as Mrs. Cody had a respirator by that time.

34. In this light, the conflicting evidence relating to the May 30th conversation between Mrs. Cody and the complainants becomes crucial. Mrs. Cody claims that she told the complainants that they could come back to work any time on condition that they wore respirators. The four complainants all testified that she told them they could not return until the report was in. The Board, therefore, must make a finding on the relative credibility of the witnesses. Mrs. Cody's evidence was corroborated by Mr. Cody and Krista Fruck who claim to have overheard the conversation. However, the Board cannot accept their testimony as impartial. Since the incident, Krista Fruck has been promoted to supervisor, Linda Bird's former position; moreover, during her testimony she clearly betrayed a bias in favour of her employer. Mr. Cody's corroborative testimony is not conclusive for obvious reasons. Furthermore, the purchase of only one respirator is inconsistent with a real intention to put the complainants back to work. Accordingly, the Board prefers the evidence of the four complainants who all testified that Mrs. Cody told them to remain off work until the final order was received.

35. On the evidence, the Board finds that the respondent did not offer respirators to the complainants; did not advise them when the order was rescinded; told them not to come in until the report was issued, i.e. until they were called. In fact, the complainants did not get back to work until one of them called Mr. Cody.

36. The Board finds that the respondent penalized the complainants by failing to recall them by May 30th. As discussed above, respirators could have been obtained by then. Indeed, if Mrs. Cody is to be believed, they could have worked from May 31st even without respirators as the interim order had been rescinded. In the result, the Board finds that the respondent also violated section 24(c) of the Act.

37. On the evidence before it, the Board can make no finding with respect to the allegations of harassment by Elaine Jennings.

38. To remedy the aforementioned violations and taking into account all circumstances, the Board makes the following orders:

- (i) The respondent shall pay Theresa Russ her regular wage for the period May 31 to June 12, 1985, inclusive;
- (ii) The respondent shall offer reinstatement to Carole Matthewson and shall pay her her regular wage for the periods May 31 to June 15, 1985 inclusive and July 6 to August 5, 1985, inclusive;
- (iii) The respondent shall offer reinstatement to Kelly Shields and shall pay her her regular wage for the periods May 31 to June 13, 1985, inclusive and July 6 to July 17, 1985 inclusive;
- (iv) The respondent shall pay to Elaine Jennings her regular wage for the period May 31 to June 13, 1985, inclusive.

39. The Board remains seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

#### **DECISION OF BOARD MEMBER F. C. BURNET;**

1. I am in substantial agreement with the decision of the majority of the Board, though not with the relative weight given to the credibility of evidence on each side, nor with one specific aspect of their decision.

2. For our purposes, the salient provisions of the Act are that an employee may refuse to do work when he "has reason to believe that the physical condition of the work place is likely to endanger himself", (s. 23(3)(b)). During the ensuing period of investigation by the employer (and, if available, employee representatives), the employee shall remain at or near his work station, at a safe place, and be available to assist in the investigation, (s. 23(4) and (5)). For convenience, this may be described as Stage 1.

3. If, following this investigation, the employee has "reasonable grounds to believe

that the physical conditions of the work place continue to be likely to endanger himself” the employee may refuse the work and request an investigation by an inspector of the Ministry of Labour, whose decision will be given in writing, (s. 23(6) to (10)). Pending such decision, the employer may assign reasonable alternative work, or if such is not reasonably available, may give “other directions”. The Board has determined that “other directions” may properly include lay-off without pay where such action is not motivated by a desire to punish the employee for invoking the Act, (*International Harvester vs. Local 127, U.A.W.* [1983] OLRB Rep. June 898). This may be described as Stage 2.

4. The first issue is whether the complainants “had reason to believe” their work place was unsafe. All parties agreed there was a strong and unpleasant odour emanating from a recently received shipment, throughout the week ending Saturday May 25. The complainants asserted that it was affecting them physically through nausea and headaches. Thirteen others in the area continued to work without such complaints and two of them testified that while the odour was unpleasant, it was relatively short lived and tolerable. An attempt was made by supervision on May 23 to alleviate the problem by simply opening doors and windows at the start of the day, but this effort terminated when the complainants complained of the cold. Evidence was provided that an unseasonably warm spell was in progress and that maximum official outside temperatures were 21C (65F) on May 21 and 24C (75F) on May 24.

5. While there is some room to question the attitude or motivation of the complainants in the light of their reluctance to co-operate in the obvious and sensible ventilation attempts, even at the cost of some relatively minor inconvenience or discomfort, I would accept their assertions of experiencing nausea and headaches and conclude they “had reason to believe” their work area might be unsafe. Accordingly, I do not think they should have been sent home at any point in the Stage 1 investigation. They should have been assigned alternative work, if such was available, up to and including Monday May 27, when the Step 2 investigation took place. No evidence was submitted to show that reasonable alternative work was not available, that is, that the employees would have been laid off if their inability or unwillingness to work had arisen for reasons entirely unrelated to this complaint. In fact, the foremen first denied them work, then called them in, then on orders from Mrs. Cody by telephone, sent them home again. The employer has the burden of proof on this aspect and in the absence of such proof, I concur with that part of my colleagues’ decision covering pay for any time lost by the complainants as a result of this situation up to and including Monday May 27.

6. The report of the May 27 inspection noted that the warehouse comprised a basement, where the majority of the suspect wallpaper was stored, and two other floors. The complainants were located on the main floor but some travelling between floors was required of them in the course of their duties. The report stated that “a solvent like odour was *faintly detectable in areas of the basement*. The wallpaper was in its original plastic wrappings and when this was opened the same odour (*faint*) was noted. No other source of any type of odour was detected.” (emphasis added).

7. It seems evident from the observations by a neutral and trained observer that the immediate “crisis” was over, whether as a result of natural diminution of the solvent odours, weekend ventilation efforts of both. This must have been equally apparent to the complainants, three of whom accompanied the inspector. Nevertheless, the inspector quite properly took air samples for laboratory analysis, and as a further precautionary interim measure ordered the compulsory wearing of masks by the complainants in the work place and the provision of



additional masks for others who might request them, and this interim order set off a new round of issues.

8. The employer secured a mask, apparently for display or demonstration purposes and asserted that the supplier was temporarily out of stock in respect of further orders. He did not expedite a further order since it seemed apparent to him that they would not be used by either group of employees contemplated in the inspector's order, given their grotesque appearance and innate discomfort and the fact that conditions had virtually returned to normal. Neither had the complainants shown much interest in donning a mask and resuming work when they were shown the sample mask several days after the inspection. In any case, they remained off work after May 27, asserting that they were awaiting a call from the Company and meantime maintaining daily contact with the Ministry to determine when the final report would be issued, but without success.

9. Mrs. Cody stated she was advised verbally by the Ministry on May 31st, that the mask order had been rescinded. She assumed the complainants would also be advised by the Ministry, claiming that the inspector had so indicated to her, and knowing that the complainants were in daily communication with the Ministry, and so she awaited their return or call. The complainants denied that they were ever advised by the Ministry of the rescinding order, despite their insistence that they were in daily contact with the Ministry. They also insisted that they had been earlier advised by Mrs. Cody that they could not return until the final report was in.

10. Mrs. Cody denied this last allegation and maintained the complainants were free to return from the date of rescinding of the interim order or earlier if they would wear a mask which she clearly did not expect them to do. In any event, communications ceased; neither side attempted to contact the other, and the complainants stayed home for about two and a half weeks. Ms. Matthewson testified that she had concluded from conversations with the inspector that if the Company had ordered them to stay home, they would be paid, and only on June 12 when she learned from Ms. Jennings that this might not be so, did she promptly call Mr. Cody. He confirmed that she and the others could return and, according to him, advised that they could have done so at any time after May 27. (During the hearing, Ms. Matthewson was alleged by a supervisor to have openly declared at the outset her intention to get some time off with pay, and to have accused others of lacking "guts" in not joining the complainants, both of which allegations she denied).

11. From this melange, and particularly considering the fact that both parties knew conditions had virtually returned to normal by the May 27 investigation, and that both knew or should have known that the mask order had been rescinded on May 31, the question becomes, who is responsible for the "stand-off" or waiting game that apparently ensued in the following several weeks? I think both parties share that responsibility. In the course of ordinary good management, the employer should have contacted the complainants to direct or encourage them back or even to ascertain their future employment intentions. He should not have assumed that their continued absence was a voluntary decision on their part. But likewise, the employees, presumably having a serious stake in continued employment and daily access to the Ministry and easy access to the employer, might reasonably have been expected to keep in better touch with the changing situation. They did not do so until one of them learned they might not be eligible for pay and only then, promptly called. Both appear to have been waiting out the other and both bear some responsibility for the consequences of their own actions or lack of it. I would award half pay for time lost in Stage 2.

12. Respecting the discharge of two complainants Matthewson and Shields after the foregoing events, there was no evidence that the change from part-time to full-time staffing was planned prior to this incident, the discharged employees were not offered the full-time vacancies in the new set-up and the business rationale offered for the change was not convincing. The employer has not met the burden of proof which the Act places on him and I therefore concur in the decision of the majority on this issue.

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**3351-84-R Ontario Public Service Employees Union, Applicant, v. Cradleship Creche of Metropolitan Toronto, Respondent, v. The Canadian Union of Public Employees, Intervener.**

**Certification - Dependent Contractor - Employee - Persons providing day care services in own home under agreement with Creche - Day-care program funded by Federal, Provincial and Municipal governments - Board weighing economic dependence and control versus personal discretion exercised - Funding persons dependent contractors**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

**APPEARANCES:** *Alick Ryder* and *Ivor Oram* for the applicant; *Martin Addario*, *Leslie MacLeod*, *Peter Chauvin*, *Myrna Francis* and *Karen Meehan* for the respondent.

**DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; February 21, 1986**

1. The name of the respondent is amended to read: "Cradleship Creche of Metropolitan Toronto".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties are agreed that, if the persons whom the applicant is seeking to represent are employees within the meaning of the *Labour Relations Act*, the unit which would be appropriate for collective bargaining purposes would be described as follows:

All employees of the respondent providing private-home day-care in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and employees in any bargaining unit for which a trade union held bargaining rights as of March 14, 1985.

5. For purposes of clarity and having regard to the agreement of the parties, the Board declares that a part-time employee who, at the making of the application, was carrying out home visits for the respondent, is not an employee in the bargaining unit described above.

6. The Board will refer to the persons whom the applicant seeks to represent as providers. The respondent contends that they are independent contractors and not employees within the meaning of the Act. The applicant takes the position that they are employees in the ordinary sense of the word, but in the alternative, are at least dependent contractors within the meaning of section 1(1)(h) of the Act and, therefore, are employees pursuant to section 1(1)(i) which states that an "'employee' includes a dependent contractor".

7. The Board has reviewed and weighed the testimony of the witnesses together with the submissions of the parties as to the conclusions the Board should reach therefrom. Having done so, the Board finds and concludes as follows.

8. The Cradleship Creche of Metropolitan Toronto ("the Creche") is an agency which provides day-care services within Metropolitan Toronto. It operates two programs: a group day-care program and a private home day-care program. It is the latter program with which this application is concerned. The program is administered from two Creche offices, one in the City of York and another in the City of North York.

9. The ultimate delivery of day-care services in the private home day-care program is through the providers who make themselves and their homes available for this purpose. The Creche is an agency licensed under the *Day Nurseries Act* ("the D.N. Act") to provide home day-care services and is responsible for assuring that the providers, their homes and the conditions under which day-care is provided in their homes satisfy the requirements of the D.N. Act. Before the Creche accepts a provider its staff first does a lengthy assessment of the potential provider, the provider's home, the number of children the provider will take and the hours and type of care to be given. If the Creche accepts the provider, they enter into a standard form agreement containing undertakings required by the D.N. Act, the number of children the provider will accept and the hours of care that will be given.

10. The Creche matches parents, children and providers. A match cannot always be made and the Creche does not guarantee placements to its providers. Once a match is made, however, the provider, parents and Creche enter into a "Provider & Parent Agreement With Cradleship Creche". This document, in addition to setting out the days and times care is to be provided, sets out the obligations of the parents and the provider and is, in large part, dictated by the provisions of "the D.N. Act".

11. Private home day-care is funded on a cost sharing basis by the Federal, Ontario and Municipal governments, with the municipal government directing the funds. In this respect, the Creche enters into a purchase of service agreement with the Municipality of Metropolitan Toronto ("Metro") to operate a private home day-care service. The fees paid to providers are set unilaterally by Metro. Neither the Creche nor the provider has any input into the setting of fees. All of the parents served by the Creche pay a fee scaled to income and all qualify for a subsidy from Metro.

12. The providers are paid by ordinary cheque of the Creche monthly upon submission of an attendance sheet showing the hours of care. The provider must have the hours verified by the parents. The Creche invoices the parents for their share and Metro for its share. The provider is paid whether or not the parents pay the Creche. No deductions are made from the payment to providers respecting income tax, unemployment insurance or the Canada Pension Plan. The Creche requires providers to have a source of income other than the income derived



from the Creche. Mothers' allowance would satisfy this requirement, so, it may be presumed, would funds provided by a member of the family for the operation of the household, or income from renting rooms. While the Creche discourages its providers from entering into private arrangements with parents supplied by the Creche, providers can take children into day-care privately with the prior acknowledgement and consent of the Creche. They must comply with the D.N. Act, particularly respecting the maximum number of children in care. The absolute maximum is five children including the provider's own children. The Creche stipulates the actual maximum number of children, up to five, which the provider can care for and the provider must not exceed that number. The provider is obligated to inform the Creche of the actual number of children in care, including the provider's own children, at any time. Twenty to twenty-five per cent of the Creche's providers have children in care, including their own, in addition to those arranged by the Creche.

13. It is compulsory for the Creche's providers to attend an orientation workshop, put on by the Creche, within the first two months of contracting with the Creche, a child care course within the first year, plus an update every three years; and a minimum of three workshops per year on various aspects of child care. Providers are also required to take a first aid training course arranged by the Creche. The Creche puts on the courses and workshops and bears the cost of them out of its administration grants and other funding sources. There is no direct evidence of any fee being charged to the providers. Nor is there any direct evidence of payment to the providers for attending courses and workshops. However, it is reasonable to infer from the evidence respecting the nature of the contractual relationship between the Creche and its providers and the manner in which they receive payment for child care, that the providers are neither charged a fee for the courses and workshops attended, nor are they reimbursed for attending them.

14. Creche staff make supervisory visits monthly to providers' homes and do a formal evaluation of the providers and their homes every six months. Providers are required at all times to work within the framework of the Day Care Provider Manual supplied by the Creche to every provider. The Creche can terminate a placement with a provider and its agreement with the provider at any time. It is an infrequent occurrence and usually results from a serious offence such as leaving children unattended or administering physical discipline. If the offence is not serious enough to cause immediate termination of the Creche's contract with the provider, the Creche will set terms for the provider. If the provider fails to satisfy the terms, the Creche will terminate its arrangements with the provider. The parents can continue to have the provider care for their children if they wish, but they would lose their subsidy.

15. The Creche is responsible under the D.N. Act for making sure that providers have adequate liability insurance, but the cost of the insurance is borne by the providers.

16. Providers must inform the Creche whenever they are unable to care for children in their charge. This is because the Creche wishes to avoid the parents being inconvenienced because care is not available; for example, missing work. The Creche is not obligated to provide alternate care arrangements but does so whenever possible for the reason just stated. The normal procedure for providing substitute care in such instances, for periods of a week or more, for example, is for the Creche to transfer the children to another provider's home. This would be the case also if a provider takes vacation during the period when the children in the provider's charge still need care. Although the Creche requires providers to inform it a month in advance of taking vacation and encourages them to plan their vacations to coincide

with periods when their children will be out of care, the Creche cannot prevent providers from taking their vacations when they wish. On the other hand, a provider who needs a day off can arrange privately for another person to come into the provider's home and care for the children. The provider is not required to advise the Creche of the arrangement, but the substitute must be at least eighteen years of age in order to comply with the D.N. Act.

17. There are no standard hours of care, but the fee schedule set by Metro for a full day of care is based on 10 hours. The days and hours during which a provider gives care is decided between the provider and the parents of the children. One exhibit of such arrangement contains hours of care from 7:30 a.m. to 6:00 p.m. and the *viva voce* evidence is that the average weekly hours of care for a provider would range between 40 and 50.

18. The Creche contends that the formal relationship between it and the providers individually and between each provider and the parents whose children are in their day-care, together with the actual conditions under which private home day-care operates, demonstrates a real relationship as between the Creche and its providers of client and independent contractor. The Creche points by contrast to its own acknowledged employees who are employed in its day-care centre. These employees work regular, scheduled hours under direct supervision. They receive, amongst other things, statutory benefits in the form of vacations and paid holidays. They are covered by Worker's Compensation, Unemployment Insurance and Canada Pension Plan statutes and they are paid by payroll cheque from which deductions are taken for income tax, unemployment insurance and Canada Pension Plan.

19. The terms "employee" and "independent contractor" are not amongst those explicitly defined in the Act. Prior to 1975, in the absence of such definitions, the Board relied on common law tests to decide an issue of whether a person was an employee or independent contractor. Since 1975, however, the word "employee" as used in the Act includes "dependent contractor" [s. 1(1)(i)], and that term has been explicitly defined by the Act since that time in what is now section 1(1)(h) which reads as follows:

"dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

20. The nature of the issue raised by the Creche, in the Board's view, makes it more appropriate to examine the status of the providers under the definition of dependent contractor. The purpose of the dependent contractor provisions of the Act was described by the Board in the following terms at paragraph 19 of its decision in *H. G. Francis and Sons Limited*, [1981] OLRB Rep. Nov. 1587:

19. The dependent contractor provision of the Act is intended to apply to persons who have some of the trappings of the independent entrepreneur, but, in reality, are in a position of economic dependence, more like that of an employee. In interpreting the section, the Board has rejected the argument that section 1(1)(h) merely codifies the common-law tests. That proposition is clearly untenable, given the academic and legal debate which preceded the 1975 amendment. Instead, the Board has viewed the statutory definition as "a new departure" which may imply that persons who have previously been denied access to collective bargaining can now be brought within the ambit of the Act. (See *Adbo Contracting Company Limited*, [1977])

OLRB Rep. April 197). Of course, certain of the common law considerations may still be important; but the Board's ultimate responsibility is to make a determination on the basis of the statutory definition set out above. As the Board observed in *Superior Sand, Gravel & Supplies Ltd.* [1978] OLRB Rep. February 119 at page 126,

[the task] is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the type of economic dependence and the kind of business relationship or obligation that it has before it; and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment, and whether or not a person furnishes his own tools, vehicles, equipment, or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than of an independent contractor.

The Board's earlier decision in *Abdo Contracting* cited in *Francis and Sons, supra*, identifies two tests established by the definition of dependent contractor in section 1(1)(h) which must be met before a person can be found to be a dependent contractor:

- (1) the contractor must be in a position of economic dependency on the client closely analogous to that of an individual employee; and,
- (2) the contractor must be under an obligation to perform duties for the client roughly analogous to the obligation an individual employee has to perform duties for his employer.

21. The substantial majority of the providers are dependent upon the Creche for their income derived from private home day-care. Only twenty to twenty-five per cent of the providers have children in care from other sources, including their own children. While private home day-care is arranged directly by Metro and by agencies other than the Creche, since the Creche discourages its providers from taking private care children in order to secure spaces for the subsidized care children on its own list of families, it is reasonable to infer that the Creche also discourages its providers from entering into arrangements to take subsidized children from other sources. In this way, the Creche controls the source of day-care customers for the providers. To the extent the Creche is successful in this respect, it is its providers' only source of income from caring for subsidized children. This dependency is further entrenched by the fact that the providers and their homes must be approved by the Creche in the first instance before they are put on the Creche's list of private home day-care providers and by their dependency on the Creche for finding children from its waiting list which are a match for the children the providers are able and willing to take into care.

22. Two other factors operate to sustain the providers' economic dependency on the Creche. The D.N. Act sets five as the absolute maximum number of children who can be in the care of a provider. Therefore, a provider cannot expand his or her enterprise beyond that number. Moreover, the average weekly hours of care for the providers as a group would be a severe limit on their opportunity to earn income from any other activity. Thus, it is reasonable to conclude that, if providers satisfy the Creche's requirement to have some source of income other than the day-care fees, the income is unlikely to be income from some other entrepreneurial activity or from employment elsewhere.

23. The Creche and its providers are equally dependent on Metro for the per diem rates



which can be charged for day-care services, since neither has any input to the setting of the rates by which the providers are to be remunerated. At the same time, the providers take no risk for collecting for their services. They are paid by the Creche according to the hours of care reported on the monthly attendance sheets which they submit. The only "entrepreneurial" risk of payment is taken by the Creche, since it is responsible for collecting from Metro for the subsidized portion of the day-care fee and from the parents for the remainder.

24. These facts show the providers to be directly and substantially dependent for earned income on the private home day-care referrals from the Creche. Their limited opportunity to obtain income from other sources of entrepreneurial activity or employment, points readily to an economic dependency on the Creche closely paralleling the dependency associated with an ordinary employment relationship.

25. The Board turns, then, to the nature of the providers' obligations to perform duties for the Creche. As long as they remain on the Creche's list of providers, their obligation is to provide day-care in their homes for the children of parents who have registered with the Creche for this service. They do have some individual latitude in fulfilling that obligation. They can refuse children referred by the Creche, or terminate an existing placement. They also decide the hours when they will be available to provide the service, in the first instance when they go on the Creche's list of providers and, in the second instance, when they enter into an agreement with the parents. While there is no direct evidence of what the Creche would do if it became dissatisfied with a provider for refusing to take children or with the hours of care being made available, it is reasonable to infer from the evidence about how the relationship between the Creche and a provider is established that there are real limits on a provider's latitude to reject children and to set the hours of care. The Creche puts a provider on its list only after, amongst other things, it is satisfied that the provider is willing and able to provide day care for children of parents on the Creche's list. If the provider becomes so selective about the children he/she will take into care or the hours of available care that the Creche's needs are not met, it is reasonable to assume the Creche would terminate its relationship with the provider. There is also a natural limit on the providers' ability to set their hours of work, and that is the hours of care which the parents need for their children. If the providers fail to satisfy those needs, they would not have customers, a problem shared with all entrepreneurs. The providers have similar scope for deciding when they will take their vacations or take a day off. They can also make their own arrangements, without need to advise the Creche or get its prior approval, to have someone replace them on a day off. This latitude to refuse or terminate placements, set hours of work and take time off is more characteristic of an entrepreneurial relationship than one of employer and employee. So too are the facts that providers bear the cost of liability insurance and that no deductions for income tax, unemployment insurance and Canada Pension Plan are made by the Creche from its monthly payments to the providers.

26. On the other hand, even though the providers perform their services in circumstances where the kind of supervision normally associated with an employee/employer relationship is not feasible, the Creche exercises control over the providers in a variety of other ways. In keeping with its responsibility under the D.N. Act and its purchase of service contracts with Metro to assure that the providers and their homes comply at all times with the D.N. Act, the Creche requires them to:

- (1) undergo initial orientation when they enter into an agreement with the Creche to have it refer children for day-care;

- (2) take a first aid training course provided by the Creche;
- (3) take, within the first year, a child care training course provided by the Creche;
- (4) update the training every three years;
- (5) attend at least three training workshops per year put on by the Creche; and
- (6) work at all times within the framework of the Day Care Provider Manual supplied by the Creche.

Those requirements are analogous to the indoctrination and on-the-job training an employer might require an employee to undergo in order to become and remain qualified to carry out his duties and responsibilities for the employer.

27. The Creche further monitors the way its providers meet their obligations to it by means of monthly visits to their homes, semi-annual evaluations of the providers and their homes and by requiring them to notify the Creche when they are not going to be available for any reason, including vacations. If the Creche is dissatisfied with the provider's service, the Creche will terminate its arrangements with the provider and remove the children from the provider's care. The manner in which the Creche does this, in other words by terminating its contract with the provider if the offence is a serious one or setting terms for correcting the problem if immediate termination of the relationship is not warranted, is consistent with the kind of corrective action an employer might take with an employee who engages in misconduct.

28. The fact that the demands of the D.N. Act and the Creche's contract with Metro impose the need for most of the controls which the Creche exercises over the providers does not alter the fact that their economic independence and their opportunity to act as independent entrepreneurs are severely circumscribed. In the result, they are left in the position where they supply only their homes and their personal attributes and labour. All else is provided by the Creche, particularly the providers' customers. In addition, the Creche imposes training requirements on the providers, monitors their performance and deals with unsatisfactory performance in a manner consistent with an employer/employee relationship. When these facts respecting the economic relationship between the Creche and its providers and the nature of the providers' obligation to perform duties for the Creche are weighed against those matters in which the providers have some personal discretion, in the Board's view, the facts point to a relationship between the Creche and its providers more closely resembling an employer/employee relationship than one of client and independent contractor.

29. The Board finds, therefore, that the providers whom the union is seeking to represent are dependent contractors within the meaning of section 1(1)(h) of the *Labour Relations Act*. By operation of section 1(1)(i), they are also employees for purposes of the Act.

30. The respondent has filed lists of employees in the bargaining unit described above

totalling 111 names. Eight of those names appear on Schedule "C" and one on Schedule "D". None of those nine persons were at work during the 30 days immediately preceding and the 30 days immediately following the application date. Therefore, the Board finds that there were 102 employees at work in the bargaining unit at the times material to this application. The applicant has filed membership evidence in the form of combination applications for membership and receipts indicating in each case payment of at least \$1.00 in respect of initiation fees in the applicant on behalf of 74 of the employees in the unit. The membership evidence was supported by a duly filed "Declaration Concerning Membership Documents". Therefore, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 10, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

31. A certificate will issue to the applicant for the bargaining unit described in paragraph 4 hereof.

#### **DECISION OF BOARD MEMBER W. H. WIGHTMAN;**

1. The concept of a "dependent contractor" found its way into our system to deal with commercial arrangements such as are to be found in chain milk store operations (eg. "Mac's Milk" and "Beckers") wherein the agreement entered into by the individual store "owner" cedes so many of the entrepreneurial decisions as to have caused the Board to conclude, that the dependency of the individual store operator upon the chain organization is such that the operator is in a position more akin to that of an employee than that of an independent entrepreneur. In these circumstances, the Board has reasoned that the right to organize and bargain collectively under the provisions of the *Labour Relations Act* should be extended to the store operators.

2. Whereas milk store operators would negotiate directly with an entity which has complete control over its purse-strings, providers of day-care would be dealing with an entity in this case Cradleship Creche, which must look to three levels of government for funding out of the public purse.

3. In my view it is not of assistance to us in assessing the relationships to know that the Creche requires providers to attend various workshop and training courses when there is no evidence as to whether the providers are paid for attendance.

4. Similarly, in light of Regulation 26 of the D.N. Act which requires "every operator (i.e. the Creche) (to) ensure that a policy of insurance with respect to each ... private-home day-care agency is obtained and maintained ...", it is not helpful for us to know that this operator requires providers to be responsible for the cost of such insurance.

5. Whether compulsory attendance and the payment of insurance costs are to be viewed as examples of the "exercise of control" or as "conditions precedent" set by the Creche before it will do business with a given provider are moot points.

6. Under the existing arrangement, if providers regard the payments as inadequate they



can (and some have) gain experience and establish themselves under the Creche agreement and then remove themselves from the agreement and accept only children under private arrangements with parents. In doing so they are not dependent upon the license granted to the Creche.

7. To the extent that this occurs it seems to me one of two outcomes are effectuated, either:

- a) the demand on the publicly funded service is reduced, or
- b) other prospective providers can be recruited by the agency, in which event the aggregate number of day-care spaces increases.

8. Either eventuality strikes me as desirable in terms of public policy and should be weighed against an interpretation of section 1(1)(h) of the *Labour Relations Act* which I presume is thought to be in pursuance of the public interest objective of furthering “harmonious relations between employers and employees” by encouraging the practice and procedures of collective bargaining between employers and trade unions as the freely designated representatives of employees as expressed in the preamble to the Act.

9. Since the preamble appears to contemplate that there may be some circumstances wherein an absence of collective bargaining is not contrary to public policy, I would have thought the beneficial effect of *not* imposing collective bargaining in this case should be the option to be preferred.

10. Submitted in evidence was a “Day Care Provider Manual”, the middle section of which is titled “Manual for Providers of Private Home Day Care”. The following appears at page 4:

“WHY IS IT IMPORTANT THAT I HAVE ANOTHER SOURCE OF INCOME

Placements are not guaranteed immediately and are not always long lasting. Family situations change, and your day-care family might move, or no longer qualify for day-care. Therefore, it is important that you have another source of income.”

11. In her evidence the executive director testified that the Creche requires providers to have a source of private income, that this requirement is reflected on a sheet handed out when the Creche receives a first inquiry from a prospective provider and that the point is made again during the screening procedure.

12. The requirement for another source of income and the stipulation in the Provider Agreement Form that providers must “inform the agency (i.e. Creche) immediately in (sic) any changes in her own family situation”, are supportive of the proposition that Cradleship Creche, as a matter of policy and in the interest of the children given into its care, seeks to *avoid* persons who would be dependent upon the Creche for their livelihood. On the contrary they seek out persons who can provide a stable environment for the children and in this connection they view a reasonable degree of economic independence as a necessary concomitant, if not a *sine qua non*, of stability.

13. The need for a stable environment seems self-evident to me and it is particularly

significant that Cradleship Creche imposes the income requirement whereas virtually all the other criteria we have considered in relation to the "dependent contractor" question are set down by the government.

14. While it is correct to say that the Creche discourages providers from taking in privately placed children this is not to say that providers are strictly precluded from doing so. Discouragement of the practice is understandable from the standpoint of the Creche but the presumption must be that, having found a stable environment, the Creche is desirous of keeping as many spaces as possible available for its own placements. This is not inconsistent with the Creche's desire for a stable environment nor with its conscious effort to recruit providers who will not be dependent for their livelihood on income from the Creche.

15. The evidence suggests that the Creche has been less than successful in recruiting providers who are not likely to become dependent on child care as their primary income source. However, the imposition of collective bargaining seems to me contra-indicated from the standpoint of public policy since its likely effect would be to attract even more providers who are motivated out of monetary considerations. I recognize this would not be the first time collective bargaining would have been imposed where the "employer" was dependent upon the vagaries of the political climate for funding and where even working conditions and practices are not within the ability of the employer to determine. Nevertheless, in creating a collective bargaining regime wherein the care of infant children would become the ultimate bargaining chip, I believe we would have gone too far.

16. Under such a regime I am also left to wonder where this leaves the provider of care under private arrangements should that individual agree to accept a Creche placement on either a long or short term basis. Consider a provider with four private placements who agrees to take in a child referred from the Creche. Is that provider now a dependent contractor? If not, does that status change should the provider agree to take a second Creche child? Does the amount paid for Creche children in relation to private placements effect such a determination? Conversely, when "Creche" providers begin to accept private placements at what point do they remove themselves from the bargaining unit? Whatever the status of these providers, is the role of the Creche not reduced to that of a baby broker?

17. In assessing the totality of the evidence, I would have considered the public policy implications as well as the evident intentions of the Creche in its selection methods and on both counts concluded that providers should *not* be found to be dependent contractors for purposes of the Act.

18. This type of case brings into focus two questions which I believe should be of concern to the Ontario Labour Relations Board and to the larger community as well. The questions are interrelated in that one has to do with the phenomena of public policies in conflict, such that one or another of the policies may be frustrated; while the second has to do with the capacity, or lack thereof, to measure and monitor the effects of decisions by tribunals such as the Ontario Labour Relations Board.

19. In the case before us a Board decision to find that providers are dependent contractors, hence extending collective bargaining to a new group of "employees" under the *Labour Relations Act*, could have cost implications which might frustrate efforts by three levels of government to pursue a public policy of attempting to provide day care at an affordable cost.

20. In recent years there have been other examples of the public policy with respect to collective bargaining coming into conflict with public policies designed to address problems of employment, skills training, and rehabilitation to name a few. The *Trent Metals Limited*, [1976] OLRB Rep. Dec. 840 case is an example. In that instance a Peterborough metal fabricating company was providing individuals with skills training in sheet metal work under the provisions of a program federally funded and administered by the Province. The public funds paid the salary of the trainers and also provided the trainees with a weekly allowance which in some, but not all, cases was in lieu of unemployment insurance. These trainees applied for and were granted union certification. The company, not being disposed to “negotiate” with two levels of government in order to meet anticipated union demands for increased “wages”, aborted the program.

21. In *Guelph Beef Centre Inc.*, [1977] OLRB Rep. Mar. 184, the effect of certifying a bargaining unit which included the inmates of the correctional institution did much to discourage Ontario manufacturers from expressing any further interest in a plan sponsored by the Minister of Correctional Services which, it was hoped, would have enabled the inmates to earn an income and, more important, develop an attitudinal approach which might have helped them in job searches after their release.

22. It is reasonable to take the position that it is not the role of the Ontario Labour Relations Board to pass judgement on the relative merits of various public policies and I would not argue to the contrary. However, I believe it is reasonable to argue that the thrust of public policy as revealed in the preamble to the *Labour Relations Act* is to “further harmonious relations” (my emphasis) and that the “encouragement of collective bargaining” is seen as a means to that end. Surely it can be argued that collective bargaining is not envisioned as the *only means* or, indeed, that it is in all instances even an *appropriate means*.

23. It should be remembered that the dependent contractor provisions of the *Labour Relations Act* leave some of the interpretation and application to the discretion of the Ontario Labour Relations Board. In these cases where we can foresee a potential conflict with other public policies and social goals such as mentioned above, my inclination would be to adopt a circumspect approach.

24. In the instances I have described the consequences of Board decisions were predictable but in many cases the consequences of our judgement calls may never become apparent to the Board. There is, for instance, empirical evidence to suggest that attempts by the Board to impose collective bargaining under the provisions of section 8, where the evidence of union support is weak, have not resulted in successful or long-lasting collective bargaining relationships. However, the writer is quick to admit that his views on this issue are impressionistic or anecdotal. Hence one wishes for dispassionate factual information as to how well or poorly our judgements have served those who have come before us.

25. In the absence of such an impartial assessment the Board is left to develop its own “solutions” to problems as we perceive them. We do this by the evolvement of case law and by such changes in practices and procedures as are permitted to us by the *Labour Relations Act*. Others of the problems, as perceived by the Board have resulted in legislation amendments.

26. To my mind there is danger in relying on the perceptions of the Board for an



indication as to what problems exist and how they should be solved. The danger inheres from the fact that, by definition, the Board is dealing with the pathology of labour relations and industrial life in Canada. To generalize from the specifics of our cases risks prescribing for the wrong ailment or for one that is non-existent, and the further risk of killing the patient with the medication.

27. This analysis is not meant to reflect on the perspicacity or intentions of those who serve and have served the Ontario Labour Relations Board. It is intended as a plea for recognition of the fact that, despite our lack of omniscience, members of the Ontario Labour Relations Board may not infrequently be put into a position of making decisions which could affect a range of public policies in an adverse way and may even be responsible for evolving practices and procedures detrimental to the policy field we are charged with overseeing.

28. It is trite, but proper, to observe that the development and monitoring of public policy, for good or bad, is better left to those we elect than those of us who are hired to carry it out or adjudicate problems to which it gives rise.

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**1346-85-M; 1804-85-M** Labourers' International Union of North America, Local 506, Applicant, v. **Disney Display**, Respondent

Construction Industry - Construction Industry Grievance - Employer - Grievances relating to work involving setting up of displays during C.N.E. - Whether employer operating business in construction industry - Board not departing from distinction between fixtures and chattels - S.124 not available

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *F. W. Murray* and *C. A. Ballentine*.

**APPEARANCES:** *Bois P. Wilson*, *Tony Neil* and *Tim Row* for the applicant; *Richard J. Nixon* and *Suzanne Duncan* for the respondent.

**DECISION OF THE BOARD;** February 25, 1986

1. These are two referrals of grievances to the Board pursuant to the provisions of section 124 of the *Labour Relations Act*. Section 124(1) provides:

Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

2. For the purpose of this section, "employer" is defined in section 117(c) as follows:

117. In this section and in sections 118 to 136,

(c) “employer” means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

The respondent employer in this case takes the position that it does not operate a business in the “construction industry”, and that the Board accordingly has no jurisdiction to hear this matter under the provisions of section 124 of the Act. Any recourse to arbitration under the instant collective agreement, being the Exhibit and Display Association of Canada collective agreement first entered into voluntarily in 1972, the respondent submits would therefore be through the provisions of the collective agreement itself, or, if the applicant desires an expedited form of arbitration, through the provisions of section 45 of the *Labour Relations Act*. It might be added that the respondent also has a “shop” agreement with Local 27 of the Carpenters’ Union which deals with the fabrication of the displays in its shop in Toronto, as well as field-installation work by members of Local 27 when required.

3. For the purposes of the *Labour Relations Act*, section 1(1)(f) defines “construction industry” as follows:

(f) “construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

The parties placed before the Board a number of decisions in which the Board has had to consider the meaning of “construction”. In *Arcan Eastern*, [1969] OLRB Rep. Apr. 141, the Board wrote, in dealing with light duty shelving and pallet racking that was bolted to the floor and attached to the ceiling by means of braces and clips, and in finding the installation of these to be “construction”:

If ... the pallet racking in this case has become a fixture, it must be considered as part of the building and, in our view, its installation would come within the meaning of the words “engaged in constructing ... buildings” in section 1(1)(f) of the Act.

6. The question thus is have the pallet racks become fixtures? We have given this matter our careful consideration. It would appear that where an article is affixed to the land even slightly, such article is to be considered as part of the land. The onus is on the party contending that it is a chattel to show that such article was intended all along to continue as a chattel. See Blackburn J. in *Holland v. Hodgson*, (1872) L.R. 7 C.P. 328 at p. 335. See also Anger and Honsberger, Canadian Law of Real Property, C. 9. Having regard to the decision and facts in *Stack v. T. Eaton Co.*, (1902) 4 O.L.R. 335, we are not satisfied that the respondent in this case has met the onus lying on it to show that the racking continued as a chattel. The case relied on by the respondent, *Comite Conjoint de l'Industrie de la Construction de Quebec v. Men-Des Inc.* 68 C.L.L.C. Paragraph 14,109, would appear to be distinguishable on its facts in that the movables there in question were held in position by their own weight and were not fastened or fixed to the premises. In any event, the present case must be decided on Ontario Law and not that of Quebec, which of course does not embrace the common law. We therefore see no reason for altering our original decision in this matter dated March 7, 1969.

The Board went on to caution, however:

7. We wish to make it clear that our decision in this case is not to be construed as carrying an implication that if the shelving had not been affixed to the building the case would not have

fallen under section 92 of The Labour Relations Act. We express no opinion on this question, preferring to leave it open to argument in future cases.

In *M. G. Burke Investments Limited* decision in Board File No. 0640-76-R dated February 28, 1977, the Board, in considering an assortment of jobs not corresponding to the present activity, wrote in general terms:

18. There are two principal issues to be dealt with in this application before considering the nature of the work which the respondent and its electricians were performing on June 30, 1976, the date of the making of this application for certification. Firstly, whether aspects of the work which was performed by the electricians and electricians' apprentices of the respondent may be considered as work within the construction industry as contemplated by section 1(1)(f). This in turn involves a consideration of whether such work is related to chattels or fixtures. Secondly, if such work is within the construction industry as contemplated by section 1(1)(f), whether the respondent is an employer within the meaning of section 106(c) of *The Labour Relations Act*, that is to say, whether the respondent is a person who operates a business in the construction industry.

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21. For the guidance of the parties the Board sets forth two general considerations concerning whether certain objects become fixtures or remain as chattels. Where an article is affixed to the land even slightly, such article is to be considered as part of the land. The onus of establishing that a given article is intended to remain as a chattel rather than a fixture lies on the party which contends that it is a chattel. See *Holland v. Hodgson* (1872) L.R. 7C.P. 328, 335; *Bain v. Brand* (1876) 1 App. cas. 762; *Haggert v. Brampton* (1897) 28 S.C.R. 174; and *Stack v. T. Eaton Co.* (1902) 4 O.L.R. 335, 1 O.W.R. 511. In addition, for a discussion of what constitutes a fixture, chattels which do not become fixtures and chattels which do not become fixtures - see Williams', *The Canadian Law of Landlord and Tenant* (1973), pps 573-580. In this regard see also DiCasteri, *The Law of Vendor and Purchaser* (1976), pps 21-22.

In *City of Toronto*, [1978] OLRB Rep. Dec. 1145, the work of the respondent's outside employees was described as follows:

11. The applicant and the respondent agreed that the persons who are affected by this application work on the respondent's property and do basically repairing, restoration and remodelling. Examples of their work include layout work, the removal and installation of demountable partitions, hanging doors, attaching hardware, cutting dutch doors, building forms, repairs to ice rink boarding, building picnic tables, the installation of picket fences, the building and installation of counters, boarding up of sheds and windows, demolition and construction of walls, the installation of drywall, the laying of floor tiles, repairs to furniture and park benches and repairs to city housing.

The Board appeared to find all but the repairs to furniture and park benches and the building of picnic tables to be "construction". The Board made reference to the earlier cases and commented:

16. ... Where an article is affixed to the land, even slightly, such article is to be considered as part of the land and work in connection with such an article would fall within the definition of construction industry. Work on chattels, of course, is not work which falls within the construction industry.

Also of some interest, although of no binding effect, are two cases involving the display industry itself. In *Disney Display*, Board File No. 2000-80-R, released December 24, 1981, the Carpenters' applied for certification under the construction industry provisions of the Act for its usual craft unit of employees involved in the same business of the respondent as is



before us now. Early in that application, the Carpenters' Union withdrew its contention that the work was "construction" and asked to have its application converted to a general one. And in *J. A. Wilson*, [1983] OLRB Rep. July 1080, the Board itself found the business of the employer not to be "construction", although it appears that there the involvement in on-site installation may have been "rare".

4. The question of what is "construction", the jurisprudence shows, can be a difficult one where the activity in dispute approaches the border areas of the definition. In that situation, the historical perspective of the parties may be entitled to some degree of weight in the course of the Board making its determination. (Compare the comments of the Board on making "sector" determinations in *West York Construction*, [1983] OLRB Rep. Dec. 2132.) Here the parties have for some years dealt with each other with respect to employing labourers for the work in question by applying the terms of the Exhibit and Display Association of Canada collective agreement. There has, of course, been in the industrial, commercial and institutional sector province-wide bargaining for the various trades in this province since 1978, with the requirement now set out in section 146 of the *Labour Relations Act* for a single collective agreement negotiated through the "employer and employee bargaining agencies". Section 146 provides:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

The work involved in these grievances was the setting up of displays for the federal government in the Automotive Building during the Canadian National Exhibition. As the respondent points out, if the applicant is correct that this is work in the "construction industry", and cannot demonstrate that the work falls in other than the industrial, commercial and institutional sector, the validity of the Exhibit and Display Association of Canada collective agreement vis-a-vis section 146 of the *Labour Relations Act* becomes an issue.

5. The business of the respondent Disney Display is the fabrication and sale of display structures for shows and exhibitions. It now operates as a separate division within a corporate organization, and a second division, Convention and Show Services, exists for the purpose of providing rental items like carpeting and furniture for display purposes. As for the respondent itself, 95 per cent of its product is considered "rental" also, and in those 95 per cent of the cases the respondent assumes the responsibility of properly setting it up or installing it at the site of the display. The framework in most instances is made from an aluminum product, manufactured by an outside supplier, called "octonorm". "Octonorm" comes in individual pieces which lock one into the other and can be built into any shape. At the end of the show, the respondent may decide to "scrap" some of the wooden frames or partitions,

but the “octonorm” is generally transported back to the shop for re-use and re-fitting in another display.

6. For the Automotive Building display which is the subject matter of the instant grievances, the respondent was called upon in the main to provide and erect display walls, islands and cases, a mock-up of a store, two large overhead aluminum crosses from which various types of banners were hung, and pressure-mounted frames from which outside banners could be hung in window apertures. The display panels themselves were in this case supplied by the customer. The reason for the window frames was that the respondent was not allowed to deface any portion of the building’s exterior, so that bolting of a banner support to the cement was not permitted. The only exception to that became a large sign over both doorways, which blew down in the wind and had to be bolted into the wall. The wall had to then be “made good”, or patched, at the end of the display.

7. Similarly, no defacing of the building was permitted to its interior as well, and a carpet had been laid to cover the full surface of the floor. This requirement meant that all display structures had to be either free-standing or supported at the top by guy-wires, either running to the mezzanine railing, or, as with the aluminum crosses, hung from the girders in the ceiling. On the evidence, only 30 per cent or less of the structures required such support, and the guy-wires were removed without a trace when the exhibit was over.

8. It would appear that *all* of the structures erected by the respondent for the purpose of the display could be moved, with greater or lesser difficulty, into another position on the floor, and with some this actually had to be done. Even the “store”, a four-sided structure with grid ceiling used for the actual sale of federal government products, was rotated some 30 feet after it had been erected in place. At the end of the exhibit, all of the display structures were dismantled by the respondent, and removed from the building without a trace, leaving the space free for the next exhibit, of which, for the Automotive Building, there are 15-20 a year. There is never any suggestion that any of these display structures become, in whole or in part, the property of the owner of the building.

9. The applicant argues that the fixture/chattel distinction is not the whole answer to the question of what is “construction”, and points to the language in the definition going beyond a “building”, in particular the words “erecting ... a structure”, as indicative of the legislative intent in this regard. The applicant points to the *Mattagami* case, [1970] OLRB Rep. Feb. 1356, involving the assembly of mobile housing units on concrete foundations, for a statement from the Board that the structure need not be permanent. And in any event, the applicant argues, the work done in this case is integral to the building, and is meant to, and does, produce an “alteration” to the “building”. More generally, the applicant urges the Board to adopt a purposive interpretation of the statute, and to take into account that the transitory nature of the employment, from exhibit to exhibit, is precisely the kind of situation that the “construction industry” provisions are meant to deal with.

10. On balance, the Board is not persuaded that it ought to stray too far in this case from the “fixture” versus “chattel” kind of distinction adopted in essence in the Board’s jurisprudence to date. We accept, in that context, the argument of the respondent that the word “structure” in section 1(1)(f) is to be interpreted *eiusdem generis* in that clause, that is, with the connotation of “real” rather than “personal” property. With respect to the present “structures”, all of them are moveable parts erected with a view to being dismantled the

moment the show is done, and at that point they do in fact vanish without a trace, most of them being reclaimed by the manufacturer (the respondent) for its own use. As well, the designation of them as "chattels" by the Board appears consistent with the practices that have grown up in this industry, and with the existing patterns of collective bargaining that appear to have developed as a result.

11. On the evidence the Board finds that the respondent is not an employer in the "construction industry", and the section 124 applications are dismissed.

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**2467-85-R** Labourers' International Union of North America, Local 493, Applicant,  
v. **Ferlanti Management Inc.**, Respondent

**Construction Industry - Employer - Respondent employing employees to construct motel which it planned to operate - Whether employer in construction industry**

**BEFORE:** *N. B. Satterfield*, Vice-Chairman, and Board Members *H. Kobryn* and *J. Wilson*.

**DECISION OF THE BOARD;** February 17, 1986

1. This application for certification was made January 8, 1986, pursuant to the construction industry provisions of the *Labour Relations Act*. The applicant is seeking to be certified as the exclusive bargaining agent for construction labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Board's geographic area #17. The Registrar set January 20, 1986, as the terminal date of the application. The terminal date was later extended to January 31st, when it became necessary to serve individual employees with notice of the application. The parties were served notice to that effect by letter dated January 23rd from the Registrar.

2. The respondent failed to file a reply in Form 81, "Reply to Application for Certification, Construction Industry", but did respond to the application by letter dated January 30th, sent to the Board by registered mail, post marked January 31st, the extended terminal date. The respondent's letter in substantial part contains the following alleged facts:

- (1) The work on the project which the respondent expected to do itself was to be finished a few days after the respondent had received the Board's notice of this application.
- (2) Effective February 1st, 1986 all construction involving the respondent's motel will have been awarded to subcontractors.
- (3) As of January 30th, the respondent had no construction employees.
- (4) The respondent is not a construction company, is not part of the construction industry and is merely directing the construction of its motel.
- (5) "As we no longer have employees, we are returning the application to you."



The letter was signed “Leo Lalande for Ferlanti Management Inc.”.

3. The allegation in the letter that the respondent is not a construction company and not part of the construction industry raises a threshold issue of whether the respondent is an employer who operates a business in the construction industry within the meaning of section 117(c) of the Act, the relevant part of which states that: “‘employer’ means a person who operates a business in the construction industry,...”. “Construction industry” is defined by section 1(1)(f) of the Act in the following terms:

- (f) “‘construction industry’ means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

4. The respondent has not requested a hearing into the application and, having regard to the Board’s discretion under section 102(14) of the Act to process an application for certification under the construction industry provisions without the need to hold a hearing, the issue can be resolved without a hearing. The facts alleged herein are on all fours with the central facts in the Board’s decision in *Tops Marina Motor Hotel*, [1964] OLRB Rep. Jan. 583. That decision was the first case in which the scope of what are now sections 1(1)(f) and the part of section 117(c) of the Act quoted above was argued before the Board. In the *Tops Marina* decision, a partnership, which had been formed to build and operate a motel, employed carpenters and labourers for its construction. A local union of the United Brotherhood of Carpenters and Joiners of America applied to the Board to be certified as the exclusive bargaining agent for the carpenters. The respondent took the position that it was not an employer within the meaning of the definition quoted above from section 117(c) because, amongst other reasons, operating the motel, not the building of it, was the predominant purpose of the partnership venture. The Board found that the building of the motel was the respondent’s immediate activity and that the work of constructing the motel fell within the definition of construction industry. On evidence that the respondent had plans for building and operating at least one more motel, the Board commented at page 587 as follows:

...While it may be that in the long run the respondent will be occupied more with operation than with building, the construction activity is an important and concrete part of its objects. Thus it appears to the Board that whether attention is focused only on the respondent’s present activity or on its present activities and future plans, the respondent is operating a business, perhaps not its main business, but nevertheless a business in the construction industry within the meaning of The Labour Relations Act.

5. Since the decision in *Tops Marina*, the Board has found in many instances an employer to be operating a business in the construction industry in circumstances where the activity at issue has been the employer’s only venture into construction work or where construction work is simply incidental to the employer’s predominant activity. See generally, Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (Toronto: Butterworths, 1985) at pages 579 and 580, and the Board decisions cited therein at footnote 16.

6. The instant application contains the statement that there were approximately four employees employed by the respondent on the date of the application in the bargaining unit sought by the applicant. The respondent’s letter is silent with respect to the number of employees who would be in the bargaining unit described in the application and the respondent failed to file with the Board any list of employees as directed by the Board’s notice of the

application. Where an employer fails to file that information, the Board relies on the information supplied by the applicant in the Form 80, Declaration Concerning Membership Documents, Construction Industry. The Form 80 filed by the applicant on January 20th states that there were eight employees in the bargaining unit on the date of the making of the application. There is nothing in the respondent's letter which would cause the Board not to rely on that information. Furthermore, the letter contains a statement that, as of January 30th, the respondent will "... not have employees for the Construction". That statement, read in context with the rest of the letter, supports an inference that the respondent had been employing persons for the construction of its motel.

7. In these circumstances, and accepting as though proven the facts alleged in the respondent's letter, the Board has before it all of the information necessary to process the application without a hearing. Therefore, absent a request for a hearing, the Board will decide this application pursuant to its discretion under section 102(14) of the Act.

8. The Board adopts the reasoning of the *Tops Marina* decision and the decisions which followed it and, on the facts alleged in the respondent's letter and the material filed with the Board by the applicant, the Board finds that the respondent operates a business in the construction industry. The Board further finds that the respondent was employing on the construction of its motel persons whom the applicant is seeking to represent. Therefore the respondent is an employer in the construction industry within the meaning of section 117(c) of the Act.

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*(Balance of decision omitted: Editor)*

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**0884-85-R** International Union, United Plant Guard Workers of America (U.P.G.W.A.) and its Local 1971, Applicant, v. **General Motors of Canada Limited** Plant 2 and 3 Glendale Avenue, St. Catharines, Ontario; General Motors of Canada Limited, Welland Avenue, St. Catharines, Ontario, Respondents

**Jurisdictional Dispute - Related Employer - Related employer application naming only one legal entity - Related employer provision not applicable where two plants of same employer subject of application - Involvement of two unions or different trades or crafts not prerequisite for jurisdictional complaint - Complaint dismissed in absence of allegation that union requiring employer work assignment**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *J. A. Ronson* and *S. O'Flynn*.

**APPEARANCES:** *Leon Paroian, Q.C.* and *Lou Balen* for the applicant; *W. Jason M. Hanson* for the respondent.

**DECISION OF THE BOARD;** February 24, 1986

1. This is an application under section 1(4) of the *Labour Relations Act* filed by the International Union, United Plant Guard Workers of America and its Local 1971 (hereinafter referred to as the "union"). In its application the applicant also requested that the Board issue a direction under section 91 of the Act with respect to the assignment of certain work. At the hearing in this matter, counsel for General Motors of Canada (sometimes hereinafter referred to as the "company") submitted that the union had not made out a *prima facie* case for relief under either section 1(4) or section 91 of the Act.

2. The history of this matter is that on April 21, 1971, the union applied to the Board to be certified to represent security guards in the employ of the company at its plant on Glendale Avenue in St. Catharines. At the time the company also employed security guards at a plant on Ontario Street in St. Catharines. A review of the Board's decision with respect to the certification application indicates that the company took the position that the appropriate bargaining unit should encompass all of its plant guards in St. Catharines. If certified for such a bargaining unit, the union would automatically have become the bargaining agent for security guards at any new plants established by the company in St. Catharines. The union, however, contended that the bargaining unit should be restricted only to guards employed at the Glendale plant. The Board accepted the union's contention, and on October 1, 1971 certified the union as bargaining agent for security guards employed by General Motors of Canada Limited at its plant on Glendale Avenue. The most recent collective agreement covering this bargaining unit was entered into on March 12, 1985.

3. In or about 1980 the company took over an existing facility located on Welland Avenue in St. Catharines. The applicant's filings indicate that security guards at the Welland Avenue plant are not currently represented by any trade union. According to the union, the Welland Avenue plant was initially used to manufacture products that had previously been manufactured at the Ontario Street plant, but since January 1985 there has been some transfer of production from the Glendale plant to the Welland Avenue plant. Notwithstanding this



alleged transfer of production, it appears that security guards represented by the union continue to be employed at the Glendale plant.

4. Section 1(4) of the Act provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

5. The remedy sought by the union in respect to its application under section 1(4) is set out in its application as follows:

8. (i) If it is found that the Respondents have carried on associated or related activities or businesses, the Applicant/Complainant requests that the Board:

(a) declare that the Respondents, GM Glendale and GM Welland be treated as constituting one employer for the purposes of the Act, in that at all material times they were carrying on associated or related activities or businesses under common control or direction within the meaning of subsection 4 of section 1 of the Act;

(b) declare that the Respondent GM Welland is bound by the Collective Agreement between the International Union, United Plant Guard Workers of America (UPGWA) and its Local 1971 AND General Motors of Canada Limited, Plant No. 2, St. Catharines, Ontario;

(c) order that the Respondents, GM Glendale and GM Welland forthwith apply the full terms and conditions of the Collective Agreement listed in subparagraph (b) above to all work performed by the Respondents, at which the said Respondents may now or in the future be engaged;

(d) amend the description of the bargaining unit in the Applicant/Complainant's certificate issued by the Ontario Labour Relations Board, certifying the Applicant/Complainant as bargaining agent of all security guards protecting the property of General Motors of Canada Limited at Plant No. 2 on Glendale Avenue, to recognize the expansion of the Respondents GM Glendale operations to the Respondent GM Welland facilities and accord the Applicant/Complainant security as to its bargaining rights.

6. The respondent contends that this is not a proper application under section 1(4) because the section was not designed to permit a union to expand the geographic scope of an existing bargaining unit. While the Board has applied section 1(4) with the result that a trade union's bargaining rights with respect to employees of one legal entity have also applied to employees of another legal entity, we know of no instance where the Board has actually utilized the section so as to expand the geographic scope of a union's bargaining rights. Any expansion of the geographic scope of a bargaining unit has been done pursuant to the Board's authority under section 89 of the Act to remedy unfair labour practices. However, given the wording of section 1(4), which permits the Board to grant "such relief ... as it may deem appropriate", we are reluctant to conclude at this stage of the proceedings that the Board lacks the authority to extend the geographic scope of bargaining rights on an application under section 1(4).

7. A second ground raised by the respondent in support of its contention that the

applicant had not made out a *prima facie* case relates to the fact that only one legal entity is named as a respondent. Although the union has styled the respondents as “General Motors of Canada Limited plant 2 and 3 Glendale Avenue” and “General Motors of Canada Limited, Welland Avenue”, it is evident from the union’s application that both the Glendale and Welland Avenue plants are operated by one corporate entity, namely, General Motors of Canada Limited. The company contends that since only one corporate entity is involved, section 1(4) can have no application. The union, however, submits that sub-divisions of a limited corporation can be treated as separate entities for the purpose of section 1(4) and in this regard relies, in part, on the decision of the Board in *Radio Shack* [1979] OLRB Rep. July 689. It appears that in the *Radio Shack* case the Board did apply section 1(4) with respect to two divisions of the same corporation. However, it also appears that all parties to that proceeding accepted that the Board had jurisdiction to do so. Section 1(4) provides that where activities or businesses are being carried on by “more than one corporation, individual, firm, syndicate or association or any combination thereof” the Board may treat them “as constituting one employer for the purposes of this Act”. In our view, the clear purpose behind section 1(4) is to enable the Board to “pierce the corporate veil” and to treat what would otherwise be separate legal employers as one employer. In the instant case, we have only one legal entity before us, namely General Motors of Canada Limited, which is already a single employer. In these circumstances, we are satisfied that section 1(4) cannot be applicable to the facts of this case.

8. We turn now to the application under section 91 of the Act. Section 91(1) provides as follows:

The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

9. The company contends that this is not a proper complaint under section 91 of the Act for a variety of reasons. Firstly, it submits that for section 91 to be applicable there must be a dispute about a work assignment between two different trade unions, whereas in this case we are dealing with only one union. The company further contends that since the union is not claiming work that is skill specific to its members, section 91 is not applicable. Finally, the company notes that it is not alleged in the complaint that the union has required the company to assign work at the Welland Avenue plant to its members.

10. Although complaints under section 91 of the Act almost always involve a work assignment dispute between two trade unions which have as members persons belonging to different trades or crafts, a close reading of the subsection indicates that it is not a necessary prerequisite to a complaint that two unions be involved, or that the dispute relate to persons in different trades or crafts. The wording of the subsection indicates that a complaint that a union is requiring an employer to assign work to persons in a particular “class” rather than persons in another “class” is covered by the subsection. At least an arguable case can be made that security guards represented by the union might be regarded as persons in one “class” for the purposes of section 91(1), while security guards not represented by a trade

union are persons within another "class". However, where the matter involves persons falling within different classes, section 91(1) specifies that the complaint triggering the dispute must be "that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer ... to assign particular work to persons in a particular ... class". Nowhere in the union's filings is it alleged that a trade union is requiring the company to assign work to persons in a particular class as opposed to persons in another class. Accordingly, we are satisfied that the pre-conditions for the Board to inquire into a complaint under section 91 have not been made out.

11. Having regard to the foregoing, both the application under section 1(4) of the Act and the complaint under section 91 are hereby dismissed.

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**1969-85-R; 2491-85-U** Christian Labour Association of Canada, Applicant, v. Maplehurst Hospital Limited, Respondent, v. Group of Employees, Objectors; Christian Labour Association of Canada, Complainant, v. **Maplehurst Hospital Limited**, Respondent

**Practice and Procedure - Settlement - Unfair Labour Practice - Prior complaint settled - Evidence on settled employer conduct allowed in subsequent complaint for limited purpose of showing pattern of conduct - Whether employer required to provide reasons for discharge in reply in order to defend discharge at hearing**

**BEFORE:** *S. A. Tacon*, Vice-Chairman, and Board Members *F. C. Burnet* and *H. Kobryn*.

**DECISION OF THE BOARD;** February 24, 1986

1. This is an interim ruling in the above matters which, on agreement of the parties, are being heard together.

2. Firstly, the Board records the following oral ruling with respect to the respondent's objection to the first eleven allegations relied on by the applicant in seeking certification pursuant to section 8 of the *Labour Relations Act*. It was not disputed that those allegations objected to related to alleged events occurring prior to an earlier withdrawal of a certification request pursuant to section 8 of the Act:

The Board has heard and considered the submissions of the respondent and the employee objectors; the Board does not consider it necessary to hear submissions on this matter from the applicant. Firstly, the Board considers that no compelling reasons have been advanced for going behind the face of the memorandum of settlement, dated November 22, 1985. That settlement states that the section 8 application is "withdrawn". Further, the Board regards the reasoning in *Comstock Funeral Homes Ltd.*, [1981] OLRB Rep. Dec. 1755 as applicable and, again, has heard no compelling reasons for departing from that analysis. Accordingly, the Board will permit the applicant to lead evidence in respect of those eleven allegations for the limited purpose of establishing a pattern of unlawful activity, of anti-union animus. The applicant has acknowledged, in accordance with the reasoning in *Comstock*, *supra*, that the evidence in respect of those eleven allegations may not be utilized for the purpose of seeking redress for the alleged unlawful activity cited therein.



3. It is appropriate to here set out the following passage from *Comstock, supra*:

16. The Board's approach to this situation can be seen in the case of *Craftline Industries Limited*, [1977] OLRB Rep. April 246. There it was the respondent employer who was asking the Board to draw an inference from the fact that several previous complaints against it had been either settled or withdrawn. The Board commented on that submission and as well on the extent to which evidence common to both the prior and current complaints was admissible, at paragraph 5:

The Board is not prepared to find that the complainant has engaged in an abuse of process by virtue of having filed a series of section 79 complaints against the respondent which have either been settled or withdrawn. The practice and procedures of the Board are designed to encourage settlement as an alternative to litigation. The parties are free to settle on whatever basis is mutually acceptable to them and in the circumstances of this case the Board is not prepared to infer that the previous complaints have been frivolous ones solely designed to force concessions at the bargaining table. The Board would point out, however, that the evidence adduced in respect to the prior complaints will be admitted for the limited purpose of establishing a pattern of unlawful activity and not for the purpose of gaining redress for the alleged unlawful activity.

The settlement of a complaint continues to be advantageous to a party for all the reasons one would normally contemplate settlement. But a party is not entitled to think that by the settlement of a particular complaint, it thereby obliterates the past, and can act thereafter with relative impunity. Rather, having avoided the time, expense and risks of litigation by the settling of a complaint, a party must recognize the possibility that future conduct of a controversial kind can force it to litigate its entire pattern of conduct to that point. This is especially so when its subsequent conduct is as predictably inflammatory as in the present case, and occurs within days of the preceding settlement. For the foregoing reasons, the Board ruled orally at the hearing that it would admit evidence of facts pertaining to the prior complaints on the basis set out in *Craftline*. The parties then agreed to have the Board simply adopt its transcript of evidence from the prior proceedings.

4. Accordingly, the Board hereby confirms its oral ruling.

5. The applicant agreed to proceed first on all matters, notwithstanding the procedural impact of the alleged violations of section 89 of the Act. During cross-examination by the respondent of the applicant's first witness, the Board sought clarification of the relevance of the questions asked. With the witness excluded, the respondent indicated that it was the respondent's position that one of the six nurses terminated (B. Cummings) was discharged for cause (i.e. for not fulfilling her duties) and that the other five were terminated because the respondent felt that, given the union activities, the one nurse could not be dismissed without the respondent incurring very serious consequences. Counsel submitted the respondent felt the situation was out of control and something had to be done to protect the patients. Counsel acknowledged that, to the best of his recollection, Cummings had never received a warning regarding her alleged failure to properly perform her duties, although a general memo indicating various concerns had been posted by the hospital administrator, U. Corcoran, in September, 1985. The rehiring of two of the terminated nurses as supervisors, indeed the creation of that classification, was stated to be related to the respondent's desire to correct severe deterioration in the standard of health care. Counsel asserted there were also serious abuses regarding scheduling changes by the nurses which had to be corrected, although counsel denied that management had reduced the scheduled hours of work, at least intentionally. Finally, counsel confirmed that the reference to "layoff" in the letters of termination given the nurses was equivalent to discharge.

6. Counsel for the applicant asserted that, as the respondent had never raised that ground for termination of the nurses, the respondent should not be permitted to do so now, especially given the earlier proceeding before another panel of the Board and extensive request for particulars of the applicant's allegations. Counsel also indicated she had asked the previous solicitor for the respondent (another member of the same firm now representing the respondent) about the respondent's position on the dismissals. Counsel stated the reply was that there were particular concerns regarding one instance where Cummings allegedly failed to treat a patient but no further details were provided, even after the applicant fully complied with the respondent's request for particulars.

7. Counsel for the respondent asserted there was no prejudice to the applicant if the defence was raised at this time and that he would undertake to provide the applicant with full particulars, including documentation relied on, without delay. Counsel added that it would be unfair for the Board to preclude the respondent from asserting its explanation for the dismissals.

8. Given the circumstances, including the time at which the matter arose, the Board reserved its ruling but undertook to provide a written decision as soon as possible so that the hearing could proceed on the dates already scheduled for continuation. In the interest of expedition, the Board has summarized counsel's positions and briefly sets out its ruling.

9. A respondent or applicant/complainant against whom "counter" allegations constituting a violation of the Act are made is not *required* to file a written reply or otherwise state its position with respect to those allegations, except, of course, in response to an express request to do so from the Board, generally in the context of a hearing. Where the alleged violations trigger the "reverse onus" provision in section 89(5), the respondent proceeds first to lead its evidence to establish the reasons for the conduct being impugned. Where, for example, improper dismissal of employees has been alleged, the respondent must establish the reasons for the dismissal and that those reasons were the only reasons, that there was no anti-union animus in the decision to dismiss: see *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745. In those circumstances, it may well be *prudent* for the employer to explicitly inform the employees dismissed of the reasons for discharge, and, indeed, to expressly note those reasons on its written reply. Nonetheless, as stated, that is not *required* so that the failure to do so would preclude the respondent from proffering its explanation for the dismissals at the hearing, through cross-examination and direct evidence of its own witnesses.

10. Accordingly, the Board will permit the respondent to adduce evidence with respect to the employer's motivation in dismissing the nurses, in particular, and in response to the other allegations of impropriety, in general. The Board notes the respondent's stated intention to provide, without delay, details and documentation with respect to its position to the applicant. Such exchange should facilitate the conduct of the hearing, particularly given the applicant's agreement to proceed first. With respect to the stage in the proceedings at which the issue arose, the Board considers that the applicant's right of reply with the witness N. Wright is sufficient to cure any prejudice arising from the applicant's agreement to proceed first with its evidence.

11. Thus, when the hearing is reconvened, the respondent will be permitted to proceed with its cross-examination of Wright including with respect to elucidating the respondent's reasons for dismissing the nurses.

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**0414-85-R** Union of Bank Employees (Ontario), Local 2104, Canadian Labour Congress, Applicant, v. **National Trust**, Respondent, v. Group of Employees, Objectors

Bargaining unit - Practice and Procedure - Union organizing and seeking certification for unit comprising of 7 of the respondent's 37 branches in Metro - Employer arguing for one unit including all 37 or single branch units - Union certifiable at each of seven branches organized - Terms and conditions of employment centrally set and identical - Unit sought by applicant given

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *D. H. Blair* and *S. O'Flynn*.

**APPEARANCES:** *Michael Mitchell*, *Steven Barrett*, *Dorothy Kent* and *Larry Bishop* for the applicant; *Brian Burkett*, *David Elenbaas*, *Sharon Scott* and *Clare Fitzgerald* for the respondent; *Lillian Byrne*, *Dorothy P. Montague*, *Michele Whittaker*, *Cindy Karlene Dobbin*, *Jenny Kokkas* and *Cindy Medeiros* for the objectors.

**DECISION OF THE BOARD;** February 28, 1986

1. This is an application for certification involving various of the branch-offices of the respondent National Trust in Metropolitan Toronto.
2. The respondent operates 37 branch offices across Metropolitan Toronto. In addition, Metropolitan Toronto is the location of the company's head office for its 143 branches across Canada, and two of its seven regional offices for the province of Ontario. The 37 branches across Metro in fact fall into 3 of the respondent's regional areas within the province: the Central Region, the Metro East Region, and the Metro West Region.
3. The present application affects 7 of the respondent's 37 branch operations across Metro. The Metro East Region itself is composed of 14 branches, of which 6 are affected by this application. The Metro West Region has 17 branches, of which 1 is affected by this application. A portion of the Central Region's branches fall within Metro, but are not affected by this application.
4. The position of the applicant is that single branches of the respondent would each constitute an appropriate bargaining unit in this case, but it asks the Board, rather than issuing 7 separate certificates, to consider issuing one certificate for the 7 branches combined. The respondent, for its part, also acknowledges that each single branch would form an appropriate unit in this case, but submits that the only other unit appropriate for collective bargaining would be a unit composed of the employees of all of the respondent's (37) branches in Metropolitan Toronto.
5. The respondent has a three-tiered management structure featuring a Branch, Region,



and Head Office level. The agreed statement of facts presented by the parties to the Board notes that:

The terms and conditions of employment for the employees are established by Head Office at National Trust and implemented at the branch level by the Branch Manager with the approval of the appropriate Regional Office.

The full-time employees at National Trust in Toronto have common terms and conditions of employment in terms of hours of work, salary levels, fringe benefits, vacation schedules, paid holidays, overtime, leaves of absence, absenteeism, hirings, terminations, discipline, transfers, promotions and demotions.

Branch Managers are responsible for the financial administrative and personnel functions at the branch. Branch Managers are required, as a matter of written policy, to either involve or obtain the approval of Regional Office and/or Head Office with respect to a wide range of employment matters including hours of work, salary levels, fringe benefits, vacation schedules, paid holidays, overtime, leaves of absence, absenteeism, hirings, terminations, discipline, transfers, promotions and demotions. In many instances, Branch Managers make effective recommendations to Regional or Head Office with respect to most of the employment matters listed above.

Performance evaluations of employees at National Trust are undertaken at the branch level by the Branch Manager. In many instances, Branch Managers make effective recommendations to Regional Office with respect to the performance rating of employees in their Branch. Performance evaluations are reviewed at Regional Office and Head Office where responsibility resides for the final performance rating of each employee.

Six of the branches in question here perform National Trust's normal savings and loan function, while the seventh performs a savings function only.

The skills, training and nature of the work of the employees who perform a savings function at National Trust is similar from one location to another.

The skills, training and nature of the work of the employees who perform a loans function at National Trust is similar from one location to another...

6. The Regional Office acts as an intermediary between Head Office and each branch of National Trust in its region. The Regional Office has a two-fold function. First, the Regional Office ensures that each branch implements the policies and procedures and maintains the standards established by Head Office and, in connection therewith, it is responsible for:

- (i) familiarizing itself with the current policies, procedures and standards of the company;
- (ii) training new and existing employees at all levels of the branch operation;
- (iii) conducting monthly meetings at the Regional Office with various groups of employees to review current policies, procedures and standards;
- (iv) attending at the branches, on a regular basis, to ensure the branch is operating in conformity with current policies, procedures and standards;
- (v) approving a variety of financial transactions, within the Regional Office's own prescribed limits of authority, that are conducted at the branch level but which exceed the Branch Manager's limits of authority (i.e., approval limits or rates with respect to consumer loans, GIC's, GTD's, branch cash levels and the waiver of service charges);
- (vi) approving a variety of operating expenses at the branch level within the Regional Officer's

own prescribed limits of authority (i.e., office and equipment supplies, repairs and maintenance expenses and business development expenses);

(vii) approving a variety of personnel-related matters within the Regional Officer's own prescribed limits of authority [hiring, absenteeism, leaves of absence, overtime, transfers, promotions, performance evaluations, salary increases, terminations]; and

(viii) remaining available, at all times, to discuss and explain Company policies and procedures with branch personnel.

Second, the Regional Office keeps Head Office informed of the financial, administrative and personnel performance of each branch in its region. Although employees receive on-the-job training at the branch level, responsibility for proper and complete training is the responsibility of the appropriate Regional Office.

7. Each branch of National Trust is an autonomous profit centre operating under guidelines established by Head Office. Branches are expected to compete for business and Regional Office fosters competition through a wide variety of on-going campaigns designed to expand the client base and to develop new business (i.e. campaigns involving the number or amount of deposits, mortgage loans, consumer loans, commercial loans, tax-sheltered products (RRSP, DPSP), safety deposit boxes, travellers cheques, money orders, etc.). Branches are ranked according to product growth, profitability and administrative performance and the most successful branches are recognized at the annual shareholders meetings. The overall performance of each branch is measured through an audit system which features an annual examination of all aspects of the branch operation by a team of auditors.

8. Interbranch activity at National Trust in Metro is as follows:

- (i) each Regional Office employs up to 3 tellers who relieve regular staff who are temporarily absent from work, for whatever reason;
- (ii) there are meetings at Regional Office which are attended by employees working at the various branches in that particular region, for the purpose of communicating and explaining current policies and practices at National Trust; and
- (iii) there is a movement of employees in all classifications among the branches of national Trust by way of transfer and/or promotion. Each transfer or promotion is approved by Region and Head Office.

9. In support of its position, the applicant submits that the Board has long acknowledged that there may be more than one "appropriate" unit with respect to a given set of facts, and that this is one of those cases. The applicant submits that the Board's cases show an attempt to wrestle on the facts of each case with the competing considerations of allowing collective bargaining to get started, on the one hand, and the greater viability which board-based bargaining units give on the other. At the same time the Board is concerned about a proliferation of bargaining units, and what excessive fragmentation will mean to the employer's organization. Without suggesting that the finding of a single branch as appropriate would in any way be wrong in this or any future case, the applicant argues that the Board in this particular case is not required to focus on the smallest unit available for the purposes of *organizing*, because the applicant has already accomplished that; but rather, particularly in light of the high degree of standardization in the operations in question here, is in a position to go the next step and take into account what would be a more viable *bargaining structure*.

The applicant points out that this accommodation by the Board would in fact reduce the problems of fragmentation and proliferation of bargaining units for the *employer*, and argues that the employer, having failed to defeat the Union at the level of initial organizing, is now simply seeking to maximize its chances of defeating the Union at the bargaining table. The applicant emphasizes that the employer's position, as the applicant sees it, is a matter of pure "gerrymandering", and points out that the alternative bargaining unit proposed by the respondent (all *branch* employees in Metropolitan Toronto) conforms neither with the Board's normal "all-employee" policy, nor the respondent's own Regional administrative organization. For its part, on the other hand, the applicant acknowledges the danger of a *Union* seeking to gerrymander by selecting only certain branches and arbitrarily sweeping unorganized branches into a broader-based unit, but emphasizes that in this case it *has* organized each of the branches it now asks the Board to group for the purpose of collective bargaining. The applicant, it might be noted finally, also asks for the inclusion of full-time and part-time employees in a single bargaining unit, in line with the policy of the Canada Labour Relations Board in dealing with what the applicant submits are comparable circumstances in the banking industry.

10. The respondent points out that the Board in its jurisprudence has required any proposed bargaining unit to meet the threshold test of exhibiting a community of interest, and submits that the random grouping of branches in the bargaining unit proposed by the applicant fails to meet that test. The respondent, counsel points out, is a centralized company with 3 levels of management, and activity between its parts flows clearly in a vertical rather than a horizontal (branch to branch) direction. The Regional Office, as indicated in the agreed statement of facts, plays a significant role in the labour-relations administration of the branch offices, and the applicant's proposed unit embraces branches which fall across regional lines. The respondent questions the efficacy of a manner of grouping the branches which is dictated solely by where the applicant has had success in organizing, and queries the community of interest that would exist, for example, in a bargaining unit composed solely of a branch in Scarborough and a branch in Etobicoke. Apart from this geographical disparity, the respondent points out that the branches are administered as autonomous, even competing units, and have no significant functional interdependence to speak of. The respondent urges the Board not to assume that the branches are necessarily of a homogeneous and consistent nature. The respondent points out, for example, that only 6 of the 7 branches perform a savings and loan function, while the seventh performs only a savings function. The respondent stresses that administration, geographic circumstances and functional interdependence are, according to the Board in the *Canada Trustco* case, [1977] OLRB Rep. June 330, the most important of the *Usarco* tests, and that these are the very factors militating against the applicant in this case. The respondent points out the random, irrational nature of the grouping which the applicant here seeks, and urges the Board not to abandon the predictability which its "one-branch" theory of organizing has fostered in this industry. For its own part, the respondent asserts that the autonomous manner in which the respondent operates its branches makes *single-branch* bargaining less disruptive to it than a combination of branches, and especially a combination which cuts across regional administration lines. The respondent stresses, in that regard, that its concern is with the quality, not the quantity, of bargaining. If the Board is prepared to look beyond a single-branch bargaining unit, the respondent argues, the next rung ought at least to be all of the branches of a particular *Region*, in accordance with the respondent's next level of organization. In seeking to have the Board give consideration to the strength-in-bargaining question, the applicant, the respondent maintains, is seeking to secure from the Board a tactical advantage which it could and should pursue at the bargaining table. Finally,



the respondent argues that the applicant should not be allowed to seek from the Board the kind of bargaining unit configuration it now seeks, without being able to satisfy the Board that it, like the British Columbia Board for example, has the power to amend its certificates in the event of future applications for certification being filed. The respondent, in addition, rejects the view that the Board ought to depart from its practice regarding part-time/full-time bargaining units.

11. A number of employees opposed to this application also were in attendance at the hearing, and the Board invited their submissions as well on this point. The employee speaking on behalf of the employees present pointed out that they were opposed to certification in any event, but that if certification were to take place, a municipality-wide bargaining unit would seem to be a lot stronger than a seven-branch unit. The employee spokesperson further raised the question of where employees affected by the certification would stand with respect to promotions and transfers to non-Union branches. On the question of part-time employees, the spokesperson indicated that she felt that the part-time employees should be separate from the full-time, as they do not share the same bargaining interests.

12. The duty of the Board to determine the appropriate bargaining unit in an application for certification is set out in section 6(1) of the *Labour Relations Act*. That section provides:

Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

As the Board recently emphasized in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, however, there may in any given case be any number of bargaining-unit configurations which are not “inappropriate”, and the Board, in the exercise of the discretion granted to it, must decide which of those configurations is *the* appropriate one for that particular case. After analyzing the language of some of the Board’s earlier cases in this regard, and in particular the *Board of Education for the City of Toronto* case, [1970] OLRB Rep. July 430, the Board in *Hospital for Sick Children* wrote:

21. ... In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of “appropriateness”, with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit.

To the same effect, see *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, at paragraph 18; *Parnell Foods Limited*, [1969] OLRB Rep. April 38, at paragraph 17. While the “most comprehensive” bargaining unit available has obvious industrial-relations advantages, the Board has long made it clear that other considerations, such as the ability to organize at all, may cause the Board to look at lesser groupings as an appropriate bargaining unit. In *Canada Trustco*, [1977] OLRB Rep. June 330, for example, the applicant trade union had organized the only branch of the employer in the town of Simcoe. The employer took the position that the only appropriate bargaining unit was either one that included the branch in the neighbouring

Township of Delhi, or all of the branches in the employer's administrative division of southwestern Ontario. In reviewing its options, the Board noted:

19. In the instant case, the standardization impressed on all employment relations by the flow-charts and policies of the employer does give rise to a community of interest among all employees in the branches of the south-western Ontario region. But that does not of itself dispose of the question of what is the appropriate bargaining unit. As the Board said in *Ponderosa* (*supra* at 10):

It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "'bargaining unit' means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the conclusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit.

20. It is also possible, of course, that different communities of interest will exist at one and the same time among several different groupings of employees. Obviously certain common employment interests exist among all employees of the respondent in Canada; the portion of those employees who are within Ontario have a further common interest; and the group of employees working under the direction of the London regional office have employment interests in common that they do not share with their fellow employees elsewhere in Ontario or in Canada at large.

13. The *Canada Trustco* case ultimately decided that the single-branch bargaining unit for Simcoe was appropriate, and, as will be discussed, that decision reflected an evolving pattern of single-branch organizing in both the financial and other sectors of the economy. Flowing from that, the respondent argues that an important measure of predictability has developed for trade unions and employees organizing in the financial sector, and that the Board ought not to jeopardize that position by moving to the unusual form of grouping being put forward by the applicant in this case. The respondent notes, in that regard, the observations of the Nova Scotia Labour Relations Board in *Michelin Tires (Canada) Limited*, [1979] 3 Car LRBR 429, at page 437:

Another set of factors which the Nova Scotia Board regards as important, and which often dictates our determinations of appropriateness, involves the legitimate expectations of the parties to the certification process. Employees who want a union, and unions organizing them, must have a fair opportunity to know before applying for certification what the appropriate bargaining unit will be held to be. The effort and expense of an organizing campaign and of the certification procedure itself should not have to be wasted because of an unpredictable Board decision that the unit applied for is not appropriate. This Board is not bound by any formal system of precedent to follow its own previous decisions but we must attempt to make sensible determinations of appropriateness which are consistent from one case to the next.

The concern there expressed by the Board, however, was that a particular bargaining unit previously found to be appropriate would, without warning, be found by the Board after organizing *not* to be appropriate. That is not what is at issue here. And as difficult as it may be for any employer to accept, that is not the way the process has tended to work. The preamble to the *Labour Relations Act* discloses a clear legislative predilection toward the fostering of collective bargaining, and nowhere has that predilection been reflected more than in the determination of the "appropriate" bargaining unit under section 6(1). Each time the Board is persuaded to move to a further stage in bargaining-unit determinations, the history

of the jurisprudence shows that the effect of that movement generally is to *increase* the options available to unions for organizing in the province. Exactly as applicant counsel has argued, in other words, the finding, if the Board were to make it, that a grouping of seven certifiable branches within Metro is the appropriate bargaining unit in the facts and circumstances of this case, would not in any way signal a rejection of the basis on which single-branch units have in the past been, or in the future would be, found to be appropriate (or the basis upon which they have been agreed to be appropriate in the present case).

14. To recognize that reality, however, is not to say that employees or their trade union are given a free hand to determine the form which their organizing will take. See, in particular, the *Hospital for Sick Children* case, *supra*, at paragraph 17. The goal stated in the preamble itself is to further “harmonious” relations, and, there are other interests at stake, such as those of the employer in being able to efficiently manage its enterprise. The need for “appropriateness” in a bargaining unit at all times serves as a check against tipping the scales too far in the direction of accommodating the desire for self-organization. As the Board as early as the *Ponderosa Steak House* case, [1975] OLRB Rep. Jan. 7, put these competing considerations:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining “between employers and trade unions as the freely designated representatives of employees.” More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes.  
...

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but “the unit of employees that is appropriate for collective bargaining.” In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization.

15. In all cases the necessary balancing is made on the basis of the particular facts and interests in the specific case before the Board. As the Board described it in *Canada Trustco*, *supra*:

7. In any particular case, the determination of the unit of employees that is appropriate for collective bargaining must be grounded in the facts before the Board. The Act contemplates a process of unit determination that is not absolute and to a great extent the Board’s determination must depend upon the competing alternatives presented by the parties. In the contemplation of the Act, therefore, the duty to determine the appropriate bargaining unit is a mandate to describe the unit in the light of the labour relations realities of the particular case.

The assessment of those “labour relations realities”, at the same time, may be affected by historical perspectives, and form part of the continuing evolution of thought on bargaining-unit “appropriateness”. To draw upon the words of the Board in *Hospital for Sick Children*, *supra*, at paragraph 14:

... Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate.



16. That process of evolution is well demonstrated in the history of this Board (and others) coming to define bargaining units in terms of single branches or outlets. The initial approach, that of *all* retail outlets within a municipality being considered the appropriate bargaining unit, was discussed in the early case of *Goodyear Service Stores*, 65 CLLC 16,018. There the union applied for a unit of all of the employer's retail stores in Metro, and the employer argued that only individual stores were appropriate. The Board wrote:

... In our opinion, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area it would not, generally speaking, be conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar bargaining interests. Such a situation where some employees might be represented by one trade union, others by another and others not at all would be invidious from the employer and trade union points of view as well as from the points of view of most individual employees.

The Board, therefore, considers that the policy it has followed in cases of retail food markets, variety chain stores and brewers' warehousing stores, and which has frequently been applied in other cases involving retail or service stores, should be adopted as its general policy in cases of retail or service stores where the interests of employees throughout a group of stores can be said to be essentially similar as in the present case.

17. That was indeed the pattern for some time, but then a Board tolerance for individual branches or outlets, at least where the *union* was the one seeking them, began to emerge, particularly in the hospitality and financial sectors. The reason for that departure was succinctly stated by the Board again in *Canada Trustco*, [1977] OLRB Rep. June 330, at paragraph 27:

27. In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board's criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all. As was said by the British Columbia Labour Relations Board in *Woodward Stores Vancouver Limited*, [1975] 1 C.L.R.B.R. 114, quoting the earlier *Insurance Corporation of British Columbia*, (No. 2) decision of the same Board:

"However, clearly one can't have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stipulate opposition to a representation campaign. If notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, the Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a conception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset."

18. In *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, the applicant union had organized one of the four retail department stores operated by the employer in Metropolitan Toronto. The employer argued that an all-Metro unit was the appropriate one. As in *Canada Trustco*, the Board noted:

11. ... Where it is raised as an issue the Board must consider the effect of a broader based unit upon employee access to collective bargaining within the industry. In addition, the Board must recognize the wishes of the employees affected by the particular application to

bargain collectively. This latter consideration requires the Board to take into account the pattern of organization in the case before it and to balance the pattern of organization against the disruptive effects of excessive fragmentation. The potential for fragmentation takes on an added weight where the Tribunal lacks the authority to restructure existing bargaining units at some future date.

The Board then went on to say:

18. As noted earlier the Board must balance a number of statutory objectives in the exercise of its discretion under section 6(1) of the Act to determine which is the appropriate bargaining unit in any given case. It is clear from a review of the authorities that the blanket policy enunciated in the *Goodyear* decision, *supra*, with respect to the geographic scope of bargaining units, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area, has given way to a series of considerations which must be made in each case. Viability for purposes of collective bargaining, on an application of community of interest principles and a consideration of the effect of fragmentation, remains a prerequisite for a finding of appropriateness. However, the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit, the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. Furthermore, in making its determination, the Board will be mindful of the precedential impact of its decision. Where, as in the department store sector, collective bargaining has not taken a foothold, the Board will lean towards the bargaining structure which best facilitates organization.

And, once again in that case, to facilitate organizing, a single retail outlet within the municipality was found to be the appropriate one.

19. Yet all of these departures ran contrary to the instinctive attractiveness of broader-based bargaining units, and the Board's preference for such units, where their impact would not stifle organizing, remained evident. In *Canada Trustco* itself, *supra*, the Board noted:

22. ... There is no presumption that the smallest unit in which a material community of interest can be found will be the appropriate bargaining unit. Along with the existence of a separate community of interest within the smaller unit, the Board must weigh the risk of fragmentation and the manageability of that unit or a pattern of units like it from the standpoint of both parties. Balancing all of these factors the Board must strive to define a rational delineation of employees that will be a viable entity for collective bargaining.

And in *Bestview Holdings*, [1983] OLRB Rep. Aug. 1250, at paragraph 28:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the

existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

Similar concerns have of course been reflected in the comments of other Labour Relations Boards. In the *Michelin Tire* case, *supra*, for example, the Nova Scotia Board observed:

... Canadian Labour Relations Boards, including the Nova Scotia Board, have recognized that from the point of view of the employer and the public, and in some respects of the employees, there are important values to be served by certifying larger rather than smaller bargaining units. Stability in industrial relations and the viability of the bargaining units certified have been dominant concerns.

This view has also received substantial elaboration by the British Columbia Labour Relations Board, notably in the *Insurance Company of British Columbia* case, [1974] 1 Can LRBR 403. That case was decided at approximately the same time as the B.C. Board in *Woodward Stores*, [1975] 1 Can LRBR 114, was granting certification for less than the full complement of retail outlets within a municipal area. In the *ICBC* case, the Board had before it the applications of three different trade unions, and the risks of undue fragmentation were readily apparent. In considering its overall approach to bargaining-unit determinations, the Board wrote, commencing at page 407:

What are the standards which the Board should apply? The statute gives no specific direction for the exercise of our judgment and we must develop the guidelines on our own. That is a difficult task for several reasons, but primarily because there is a tension between the two uses of the bargaining unit. On the one hand, the scope of the unit is the key to securing trade union representation and collective bargaining rights for the employees. Since this is a fundamental purpose of the Code, the Board's definitions must be such as to facilitate organization of the employees. On the other hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.

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The simplest reason favouring one overall unit is *administrative efficiency and convenience* in bargaining. All other things being equal, it is preferable to have only one set of negotiations going on, rather than spreading management efforts among two or three or even more units.

• • •

A second administrative factor, this one clearly in the interest of both employer and employees, is the matter of *lateral mobility*. The presence of several bargaining units, each with their own seniority lists and different contract benefits, is an obstacle in the way of an employee's transfer or promotion out of the original unit into which he was hired. This limits the mobility of the employee whose place of residence may have changed and who thus needs a different job or the employee who wants to improve his job position through promotion to a position which has come open in another division. It also restricts management's range of selection among qualified persons to fill a job.

• • •

The existence of a single bargaining unit facilitates the achievement of a *common framework of employment conditions* - vacations, statutory holidays, overtime, insurance scheme, pension plan, and so on. ICBC has developed a wage structure whereby all the positions across every



division have been evaluated and placed in some coherent relationship one to the other. It is unlikely that this pattern would continue if there were two units represented by different unions. Indeed, if we did not expect different terms of employment to emerge, there is no reason to allow separate representation for groups of employees.

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Another factor favouring a single large unit is the objective of *industrial stability*. If there is one union and one set of negotiations, then the risk of strikes has to be less than if there are several unions negotiating separately.

20. In fact, the British Columbia Labour Relations Board's whole treatment of this issue is particularly noteworthy. In *Woodward Stores* itself, *supra*, the Bakers' Union had organized at three of the employer's stores in Greater Vancouver, and applied to be certified for a *separate* unit at each of the the stores. The *employer* raised the problem of fragmentation with the Board, and argued that the only viable unit for it was one composed of all nine of its stores in the province, or, alternatively, of all five of its stores in Greater Vancouver. In answer to the employer's submissions, the Board wrote at page 118, as noted in our own *Canada Trustco*, *supra*:

Whatever be the reasons for it, it remains a fact that if the Board were to focus on the long-range enquiry of how collective bargaining should best be carried on in the department store industry, it will likely achieve the short-run result that collective bargaining will not be conducted at all.

In deference to the employer's concerns, however, the Board went on to state:

We should not leave this discussion of the Board's general policy under s. 42 of the Code without some further remarks about how we do view the problems of the development of bargaining units for an employer. Counsel for Woodwards accurately depicted the industrial instability which can be produced by a multiplicity of unions in a patchwork of small bargaining units - whipsawing of the employer, consecutive strikes and picket lines, jurisdictional disputes and so on. That is the risk attendant on a policy of facilitating the achievement of collective bargaining through the building blocks of small units. For the reasons stated above, we do not feel it desirable to forestall any such risks by sticking rigidly to bargaining units so large that the process of collective bargaining is aborted before its birth. However, we do intend to minimize that risk through a policy of strict control over the growth in the number of bargaining units in an operation such as Woodwards.

There is one common practice, in particular, which produces excessive fragmentation of the employees of one employer or in one industry. A union applies to represent one small group of employees and obtains certification; a second union applies for certification for another small group and also is certified; after this process has continued for a period, another union, (perhaps one of the incumbents) applies to be certified for all of the employees except those already represented by someone else. One can understand why it is in the mutual interest of trade-unions to reach that type of accommodation. However, the Board is determined not to permit that kind of practice to build in, indefinitely, a large number of small collective bargaining relationships with one employer. We will be flexible in defining appropriate bargaining units in areas such as the department store industry to afford collective bargaining some room to put down firm roots. However, after a time, rather than creating new bargaining units, we will consider that the existing units must be enlarged or merged and all of those employees represented by one "trade-union"....

And concluded, at page 122:

While a single location bargaining unit must be considered appropriate in light of the history of bakery certifications in this province, we do consider this an apt case in which to apply

our policy of minimizing the number of separate bargaining units at an employer such as Woodward's. The Union has as members a majority of the bakery employees at each of the three store locations for which it has applied and has a substantial majority when all three are put together. Consequently we conclude that there should be one unit comprising of all the bakery employees at the *three* locations.

In addition, the Board, out of a further concern for fragmentation, went on from there to state what has come to be known as the "*Amon* principle", as follows:

If and when the Union organizes the employees at the other locations the Board will enlarge this existing bargaining unit to include them.

21. *Amon Investments Ltd.* was a decision of the B.C. Board issued July 20, 1978. The employer owned a number of apartment buildings in Vancouver, and the union had applied for certification for the maintenance and service staff of one of them. Over the objections of the employer, the Board ruled that the employees working at that one location constituted a viable, separate bargaining unit. The Board then added, at page 20:

This conclusion does not, as we have previously hinted, require that we ignore the concerns expressed by counsel for the Employer with regard to the potentially inconvenient and disruptive consequences of a fragmentation of the employees into a number of bargaining units. We return again to the *Woodward* decision. In granting the Bakery and Confectionery Workers International Union of America, Local 468, certification for a unit comprised of bakery employees at only three of the several stores in which the employer in that case operated a bakery, the Board added:

"... if and when the union organizes the employees at the other locations the Board will enlarge the existing bargaining unit to include them."

We consider the same kind of qualification to be appropriately added to the certification the Board has granted the Union for the employees at the Nelson Place Apartments. The effect of this qualification is to confine the number of bargaining units to one only.

This principle was again made reference to by the B.C. Board in another case that year, *The Original Dutch Pannekoek House*, [1979] 1 Can LRBR 212, in which the Board certified a union for a bargaining unit of two of six restaurants in the City of Vancouver.

22. By 1981, the B. C. Board appears to have been lumping together a selected number of branch outlets of an employer as a matter of course. In *Thompson Valley Savings Credit Union*, Board decision numbered 414/81 and issued September 2, 1981, the union had applied for eight of the employer's branch credit offices, and then amended it to seven. The Board wrote, in construing the language of its own statute:

... The Employer argues that the bargaining unit applied for by the Union is inappropriate for collective bargaining. In respect of the initial application the Employer argued that branch-by-branch certification was the only appropriate way to have Union representation of the Credit Union's employees. With respect to the amended application the Employer argued, in addition, that the unit applied for by the Union is not appropriate even if an all-employee unit were considered appropriate by the Board.

This argument misconceives the requirement in the Labour Code for a determination by the Board, in certifying unions, to find an appropriate bargaining unit.

Section 42(1) of the Labour Code reads as follows:

S. 42(1) Where a trade union applies for certification as a bargaining agent for a unit, the Board shall determine if the unit is appropriate for collective bargaining, and may, before certification, include additional employees in or exclude employees from the unit.

The Board is not required to determine which is the *most* appropriate bargaining unit, but rather must determine whether the unit for which the Union applies as bargaining agent is appropriate. There is not necessarily a particular bargaining unit which is the only appropriate one for an employer. The determination which the Board must make is whether the bargaining unit for which the Union applies is *an appropriate bargaining unit* (cf *Royal Bank v. SORWUC*, [1978] 1 Can LRBR 326).

In this case it may be arguable that individual branches of the Employer, or all branches of the Employer, are more appropriate bargaining units than the one applied for by the Union. However, that is not the determination which we must make. What must be decided is whether *the* unit applied for by the Union here is *an* appropriate bargaining unit. There is little doubt that the employees, while at different locations, share sufficient community of interest to be considered as within a single bargaining unit and I find that the unit applied for is an appropriate one for collective bargaining.

Given the comments of the Board in our own province with respect to not being required to determine the “most” appropriate unit, cited above and below, it is not apparent that the difference in the British Columbia language and our own section 6(1) is a material one.

23. Finally, the case of the B.C. Board in *Sung Food*, issued March 15, 1984, is interesting, not only because of some obvious parallels on the facts with our own, but also because it specifically addresses the question of how membership support is to be calculated. The employer operated eleven low-cost, self-service retail food outlets and a central warehouse in the Lower Mainland. The union applied for a unit consisting of four of the retail outlets. The original panel, concerned about “sweep-ins”, decided that membership support should be calculated *separately* for each of the four store locations. The result of that was automatic certification for a bargaining unit consisting only of the two stores for which the union had better than 55 per cent, even though the union’s overall percentage amongst the four stores exceeded 55 per cent. Both sides sought reconsideration of that decision.

24. On the “four stores out of eleven” issue, the review panel wrote, at page 4:

... in considering an appropriate bargaining unit we must consider not only the Employer’s need for a structure minimizing industrial unrest in the long run but also the Union’s request for a vehicle which will allow for the establishment of collective bargaining. This four-store unit achieves one of the goals: it permits trade union representation. Does it thwart the competing one?

First, the employees in these four stores presently share a common framework of employment conditions - a framework which can form the basis for a single collective agreement for all of those employees. Second, the employees in the four locations share a community of interest, receive the same training, work essentially the same hours for the same rate of pay and perform virtually identical duties. Third, although there are four different locations, the evidence reveals that there is some lateral mobility available to and utilized by the employees in each of those stores to transfer from one store to another. Finally, it is in the interests of the Employer to have a single bargaining unit where day-to-day decisions regarding the terms and conditions of employment of the employees, their continued employment, or their cessation of employment is administered through centralized management in a uniform and consistent manner.

The fact that there are seven other store locations which could, in the future, be varied into this bargaining unit does not detract from the existence of a rational and defensible line being drawn around the four units presently proposed.



And then, after a discussion of *Woodward* and *Amon*, at page 5:

... here, an all-employee bargaining unit for all eleven stores and the central warehouse would clearly be the most appropriate bargaining unit. However, to require that would be to discourage the acquisition and exercise of collective bargaining rights which can be exercised and encompassed within the language of a single collective agreement.

The review panel then went on to decide that it had no jurisdiction to apply the 55 per cent test to any constituent *part* of an applied-for bargaining unit, and certified the union for a unit of all four stores, on the basis of its overall percentage. Whatever we might say about that latter aspect of the British Columbia Board's approach to the question, the foregoing review of the jurisprudence appears to produce one common theme in the inclinations of Labour Boards across the country when called upon to determine the "appropriateness" of a bargaining unit: except to the extent that it would unduly create an obstacle to the introduction of collective bargaining at all, for a variety of labour-relations considerations affecting all parties to an application for certification, as well as the public, generally "bigger is better".

25. Before turning to the facts of our own case, it is important to refer once again to the present state of the jurisprudence on bargaining-unit "appropriateness" in the province of Ontario. That state is best set out in the Board's recent decision, adverted to earlier, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. To begin with, that case notes the following passage from *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481:

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered.

And further, at paragraph 20:

20. In *Kidd Creek* (and *Stratford General Hospital*, to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted.

And finally, at paragraph 23:

... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: *does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.*

(emphasis added)

26. In the present case, the respondent has conceded the appropriateness on a

community-of-interest basis of one (or each of 37) of its branches within Metro standing alone, as well as of all 37 of its branches standing together. The only factual question for the Board is whether the 7 branches within Metro for which the applicant believes it is individually certifiable have, in the words of the *Hospital for Sick Children* decision, “a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer”.

27. All 7 of the branches sought to be combined fall within the bounds of what the Board would normally recognize as an appropriate geographic area. The employees at each branch perform essentially the same job functions and services for the respondent, and their terms and conditions of employment are uniform and set centrally. To the extent that either the Regional or branch levels of administration have responsibility for the implementation of personnel policy, that policy is the one set centrally by Head Office. Six of the seven branches involved here fall within the same Region, and there is regular contact through meetings of all of the employees within a Region. There is also a history of movement of employees in all classifications amongst the various branches of the respondent by way of transfer and/or promotion.

28. All of these factors could, of course, be used to support the appropriateness, if disputed, of the broadest unit of branch-offices possible within Metro, being one comprised of all 37 of the branches therein. But once again the “most comprehensive” form of bargaining unit would begin to compete with the notion of allowing collective bargaining to begin at all. From our earlier review of the jurisprudence we have noted how Labour Boards in this and other jurisdictions have, in deference to that consideration, found it appropriate to impose upon an employer the burden of *individual* branch or outlet bargaining units, with all of the risks attendant upon such a proliferation of separate bargaining units: fragmentation of the employer’s enterprise, duplication of bargaining, additional exposure to strike and picketing activity, and the potential for “leap-frogging” should different units fall to be organized by *different* trade unions. From thatpoint of view, the issuance of bargaining certificates for *individual* branches or outlets would appear to present a “worst case” scenario for the employer, with *any* consolidation of branches into one bargaining unit tending to minimize the number of bargaining units which the employer may ultimately be required to deal with.

29. This is true, we note, whether or not a particular Labour Board has the power to subsequently amend or consolidate existing certificates. The British Columbia Labour Relations Board, as noted, has that power. The Ontario Labour Relations Board has effectively said that it does not (see *City of Toronto Non-profit Housing Corporation*, [1982] OLRB Rep. Feb. 280. But nothing in the present case turns on that. The “*Amon* principle” of the B.C. Board was not a response to employer concerns over the certifying of 3 out of 5 retail outlets; it was a response to employer concern over certifying *anything* less than all of the employer’s outlets in a given municipality, and in particular over the practice of issuing certificates for individual locations. Indeed, the *Amon* case itself involved the issuance of a certificate for a *single* location in the municipality. What the “*Amon*” principle represented in other words, was recognition that the *individual*-branch approach to certification was a departure from standard notions of what would constitute for everyone a more viable form of bargaining structure, and an attempt to move back toward more comprehensive, broader-based collective bargaining. Whether, as with the B.C. Board, the result might eventually be a municipality-wide bargaining unit, or whether, as under the present Ontario case law, the Labour Board is restricted to whatever consolidation of bargaining units is available to it at the outset, the

result, in moving away from the ultimate in fragmentation posed by *individual* branch bargaining units, would appear in any event to be an improvement administratively from the point of view of the employer.

30. In light of that, the Board in this case invited the respondent to assist it with the kinds of problems that it foresaw with respect to the 7-branch bargaining unit being asked for by the applicant. It should be noted that the two parts of the “test” set out in the *Hospital for Sick Children* decision, cited above, are not mutually exclusive, and the respondent’s concerns fell roughly into three categories: the inappropriateness of the applicant’s unit in terms of its own form of vertical administration, the inappropriateness of the applicant’s unit in terms of geographic circumstance, and the inappropriateness of the applicant’s unit in terms of the independent manner in which individual branches are expected to function.

31. On the first point, while the likely impact of a proposed bargaining-unit configuration on the employer’s existing lines of administration is very much *one* of the factors the Board must take into consideration, the existence of those lines of administration is not in itself dispositive of the basis upon which employees will be required to self-organize in a given case. As the Board put it in *Canada Trustco, supra*, at paragraph 18:

... The Board’s decisions have proceeded on the general principle that while the employer’s administrative structures are relevant in determining the bargaining unit they are not necessarily to be taken as the conclusive blueprint in deciding what is appropriate. The structures and policies that promote a maximization of the employer’s business interests are not necessarily those that will describe a sound and viable bargaining unit within the contemplation of The Labour Relations Act.

In addition, as the Board observed was the case in *K-Mart, supra*, at paragraph 20, the Metro-wide unit normally considered by the Board to be appropriate and acknowledged to be so in the present case does not itself conform to the respondent’s particular lines of administration: the 37 branches within Metropolitan Toronto cut across not 2 but 3 of the respondent’s regional administration lines.

32. But notwithstanding that acknowledgment by the respondent, the Board has considered whether a fairer accommodation between the applicant’s concern for broader-based bargaining and the respondent’s own lines of administration would be a consolidation of certificates at least in accordance with the *regional* boundaries of the respondent which exist within Metro. That would have the effect of grouping the 6 certifiable branches falling within the Metro East region into one unit, and leaving the one branch falling within the Metro West region as a separate unit to be certified on its own. Were there evidence of a more significant degree of independence at the Regional level in the formulation of labour-relations policy, or in the actual setting of terms and conditions of employment, we might well have been inclined to adopt this view. In this particular case, however, the facts disclose that labour-relations policy and the terms and conditions of employment, although *administered* at the Regional and Branch levels, are set on a central and uniform basis by Head Office. It does not seem unreasonable to assume that this would continue to be the case with respect to the collective bargaining which is about to take place as well. While consultation with the Regional managers involved may well have to form part of that centrally-controlled bargaining, just as it would with the administration of collective bargaining within the conceded Metro-wide unit, the need for such consultation on the facts present here would not seem to place in the way of the respondent a hardship that is of an unreasonable degree.



33. On the question of geographic circumstance, we note first of all that all 7 of the certifiable branches sought to be combined fall within what the Board would normally consider to be an appropriate geographic area, a single municipality. As to the application of the normal community of interest or *Usarco* tests within that municipality, we again note that the respondent has conceded that a bargaining unit of all 37 of its branches in Metropolitan Toronto would meet the *Usarco* tests. That concession presumably stems from the Board's initial approach in dealing with applications of this type (*Goodyear Tire, supra*, etc.), and that approach itself was based on a recognition of the uniformity in employment conditions and type of work performed within "like" branches of a retail-service employer. As between a one-branch unit and a seven-branch unit within Metro, those considerations would appear to favour a grouping into a seven-branch unit as well. If, on facts like the present, geographic circumstance is not a compelling factor when considering the community of interest of a branch in Etobicoke and a branch in Scarborough as part of a 37-branch unit, it would not appear to be significantly more so only because the overall number of branches in the unit is reduced from 37 to 7.

34. The final aspect of the respondent's submission on community of interest is that relating to the independent nature of the branches, and more specifically, to the fact that branches lying within the same general neighbourhood (as a result of the recent merger with Victoria & Grey) are encouraged to "compete" with one another for business. This is a consideration which the Board has in fact given weight to in the past. See *Magna International Inc.*, [1981] OLRB Rep. Sept. 1260. It does appear, however, that the individual plants (and profit-centres) in that case enjoyed a substantially higher degree of independence and local autonomy than can be said for the trust branches in this case, and, as a significant reflection of that, the practice was to have *no* movement of employees between plants in that case. We would note in the latter regard that the concern expressed by the objecting employees as to their seniority rights and the continuation of their present mobility, while obviously better answered by a 37-branch unit than a 7-branch unit, would appear nonetheless to be better answered by *some* form of grouping within Metro, if that is otherwise available, than by potentially 37 different individual branch bargaining units. We might also note, lest there be any doubt on this point, that the application for certification as posted in this case did call for a grouping of the 7 branches in question as its primary choice of bargaining unit.

35. The final point that the Board must consider is the respondent's submission that the Board ought not to use its power to determine bargaining units as a means of addressing the question of relative strength at the bargaining table. The respondent submits that that is a matter appropriate for the parties themselves to address in bargaining, and the respondent points in support to the decision of the Canada Labour Relations Board in *Bank of Montreal*, [1982] 2 Can LRBR 390.

36. That case provides a useful review of the history of "single-branch" bargaining in the financial industry. The Canada Board recalled how, beginning with the *Canadian Imperial Bank of Commerce* (Victory Square Branch) case, [1977] 2 Can LRBR 99, it had been led by a concern that union organizing gain a foothold in the industry to permit, with some misgivings, the establishment of single-branch bargaining units, relying upon the subsequent good will of the parties to "seek to avoid chaos in the bargaining relationship". In the particular case before it, the union over a period of 6 months had obtained certification for separate bargaining units of 9 of the 14 branches of the Bank in the City of Windsor. The

union then proceeded through two amicable rounds of bargaining with the Bank, described as follows, commencing at page 384:

Collective bargaining between the employer and the union commenced in April, 1979 on behalf of the certified branches in Windsor. The union's efforts were coordinated by Mr. Raymond Murray, Area Representative. Mr. Roy Legge, who was at that time Director of Industrial and Employee Relations, represented the employer's interests. Union proposals had been formulated at a general membership meeting of all members regardless of which branch they worked at. Bargaining committees were set up for each branch comprising two members along with Mr. Murray. The format of the collective agreement proposed by the union was fashioned after an agreement recently entered into between the employer and the union affecting a branch at Bells Corners, Ottawa. That had been the first collective agreement entered into and it had taken effect on February 16, 1979. The union had proposed some twenty-five amendments to the Bells Corners agreement. Bargaining sessions began with meetings between Mr. Legge accompanied by two other employer representatives and Mr. Murray and the branch committees. Meetings were consecutive, branch by branch. That system soon bogged down. It was cumbersome and repetitive. The union changed its structure, it formed a three person committee to speak on behalf of all the branches. The employer raised no objection and bargaining resumed in a positive and amicable fashion. An agreement was reached and signed on July 11th, 1979. The union obtained ratification at a general membership meeting with a single vote of all members. Separate agreements were signed for each branch, each identical but for slight insignificant variations such as names of part-time employees affected at any given branch. The term of the agreements were for one year effective February 16th, 1979.

Negotiations in 1980 followed a similar pattern. Mr. Legge had stepped up as Vice-President, Human Resources, and was replaced at the head of the employer's bargaining team by Mr. Fred Cowell, Employee and Industrial Relations Manager. Mr. Murray again directed matters on behalf of the union. The union continued with its three person committee speaking for the nine branches. To give more direction to the negotiations, it was agreed to focus on one branch being the Windsor Main Branch. The language of any agreement arrived at would apply to all branches. This time the bargaining extended into the conciliation process. Notwithstanding that the union had filed nine distinct applications seeking conciliation assistance, the process under the guidance of the conciliation officer continued in the same consolidated fashion. An agreement was reached and ratification was conducted at a single meeting with one vote. Separate agreements were executed for each branch to be effective February 16, 1980 to December 31, 1981.

At that point it appears that the union began to address the issue of extending seniority rights beyond the individual branches, and, without even raising with the employer the question of such extension, or of consolidation of the existing collective agreements, moved before the Board for an amendment to its certificates to combine them into one.

37. The Board did not have to deal with the case on the basis of an assumed "imbalance" in bargaining power between a large national bank and individual bargaining units, noting at page 389, on the history of the negotiations to that point:

Has the "imbalance" been used to dilute the union's strength or to render it impotent at the bargaining table? It appears not!

Rather, the Board assessed the matter against its policy of restraint in interfering with substantive matters in *ongoing* bargaining relationships, concluding, at page 391:

In keeping with those policies of non-interference the Board sees nothing in the specific circumstances presented that places this case in the "extraordinary" category where it would invoke its powers to balance the scales. There is no evidence of employer wrongdoing. The bargaining relationship is young and maturing albeit perhaps not as fast as some would like.

A common certification order would give the union no more than it has now. With all of the collective agreements having a common termination date the union is able to exert its combined strength if it so wishes to correct or attempt to correct the ill it has chosen to identify. The Board will not intercede at this time.

The matter having arisen as it did, the Canada Board did not have to consider what it might be disposed to do with the issue of consolidation, were it at the point of structuring a bargaining relationship that was fresh.

38. We fully recognize that the designation of "the appropriate bargaining unit" by the Board may carry with it a significant impact on, amongst other things, the question of strength at the bargaining table. As the Board noted in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, at paragraph 50:

... section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord.

And, ironically, as was also noted in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, at paragraph 5:

... The company maintains that the Board must look to bargaining structures which will work and argues that the proven viability of all-store units should convince the Board to follow its standard practice with respect to retail outlets. The company points to the certification within the banking industry on a branch by branch basis as an example of a bargaining structure which has not worked.

39. But whether the oft-used term "viable" bargaining unit in the case law of the various Labour Boards was meant to specifically include the "bargaining strength" question need not be decided here. Quite apart from that, for the reasons given earlier, the 7 branches in Metropolitan Toronto sought to be combined here do appear to us to have "a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer". The Board having that option, therefore, on the facts of the case before us, it is the view of the Board that the legitimate labour-relations interests of all of the parties, as articulated most fully in the *Insurance Company of British Columbia* case, *supra*, are best served by the adoption of that unit.

40. That unit is also the one which, in our view, best reflects the reality of the collective bargaining that is about to take place. We ask again, as we did at the hearing, whether any experienced person really believes that *either* side, in the present circumstances, would allow bargaining to proceed at individual branches on a truly independent basis? The history of the negotiations set out in the *Bank of Montreal* case, *supra*, for example, is but one illustration of the kind of bargaining that is likely to take place under these circumstances. Whether individual-branch bargaining with all employers could be co-ordinated as smoothly as it was with the Bank of Montreal is not known, but giving more consideration to the question "at



the front end'', in the words of *Hospital for Sick Children, supra*, where an appropriate opportunity presents itself, would appear to be a constructive way to minimize the potential for problems, and to eliminate the need for artificial means of co-ordinating the bargaining. The existence of such a combined unit still will not, as the *Bank of Montreal* case notes, dictate the *result* of bargaining on substantive issues like mobility rights, but it will at least provide a framework within which these issues can be discussed and freely negotiated, without legal impediments being raised.

41. To summarize, it is only the bargaining framework, or structure that is at issue in this case. The reduction of the "appropriate" unit to the minimum level required for organizing to "gain a foothold", in the language of the earlier cases, is not the issue: the applicant already has had its success in organizing at a number of the respondent's branches. Nor is the appropriateness of those individual branches as units for certification in issue: at the very least, prior Board jurisprudence points to their appropriateness as individual branch-units standing alone, and the agreement of the parties on the particular facts before us confirms that certificates could issue on that basis. The *only* question, in light of that, is whether those certificates would more appropriately be combined at this stage into one, and for all of the reasons set forth above, we conclude that they would.

42. It follows that only those branches for which the applicant is otherwise certifiable are affected by this decision on the part of the Board to consolidate individual branch-units into what the Board finds to be a "rational and viable" single bargaining unit. Unlike the British Columbia Board, we see nothing in our legislative mandate which prevents us from taking into account the fact that individual certificates for bargaining are about to issue in any event, when turning our mind to the question of the appropriate form of bargaining unit within which that bargaining ought best to proceed.

43. While the argument has proceeded to this point on the basis of certain assumptions, a final determination of which of the 7 branches the applicant is in fact entitled to certification for will have to await the resolution of all outstanding issues relating to the membership evidence filed in this case, together with the list of "employees" employed in the unit at each branch. Should it become material, the Board will also have to decide at that point whether it would be appropriate to issue an "interim" certificate covering all branches for which the applicant is immediately certifiable, as opposed to those which, for one reason or another, the applicant would only become certifiable following the taking of a representation vote.

44. Finally, on the issue of whether the "part-time" and "full-time" employees ought to form one bargaining unit or two, the Board is not persuaded in this case that it ought to depart from its own practice of separating the two for the purpose of collective bargaining. For a review of the considerations taken into account by the Board in this regard, see *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713.

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**1977-85-U** Labourers' International Union of North America, Local 183, Complainant, v. Olympia & York Developments Limited, c.o.b. as **Olympia Floor & Wall Tile Co.**, and Joe Schochet, Respondents

**Evidence - Practice and Procedure - Unfair Labour Practice - Complaint alleging discharge for union activity - Employer seeking to introduce polygraph evidence to support credibility of testimony - Polygraph evidence not allowed**

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members J. A. Ronson and S. O'Flynn.

**APPEARANCES:** L. A. Richmond, M. O'Brien and M. Kevins for the complainant; John C. Murray and J. Schochet for the respondents.

**DECISION OF JUDGE R. S. ABELLA AND BOARD MEMBER S. O'FLYNN;** February 17, 1986

1. This complaint alleges that the respondents violated sections 64, 66 and 70 of the *Labour Relations Act* by firing Michael Kevins for union activities. The respondents deny that this was the motive and Joseph Schochet, who carried out the termination, seeks to disprove the allegation not only through *viva voce* evidence, but through the introduction of polygraph evidence.

2. The respondent Joe Schochet wishes to introduce the polygraph evidence because, in this reverse onus situation, there is a heavier burden on him. One of the issues is motive and, he alleges, polygraph evidence will assist the Board in assessing his credibility.

3. The complainant union resists the introduction of this evidence on the grounds that it is unreliable and entirely inappropriate in a labour relations context. It cites Part XI - A and specifically sections 39a - 39d of the *Employment Standards Act* as a legislative reflection of public policy in its prohibition of lie detector tests in employer/employee relationships. It relies particularly on section 39b which states:

39b.-(1) An employee has a right not to take or be asked or required to take or submit to a lie detector test.

(2) No person shall require, request, enable or influence, *directly or indirectly*, an employee to take or submit to a lie detector test.

(3) No person shall communicate or disclose to an employer that an employee has taken a lie detector test, or communicate or disclose to an employer the results of a lie detector test.

[emphasis added]

"Lie detector test" is defined in section 39a (c) as follows:

"lie detector test" means an analysis, examination, interrogation or test taken or performed by means of or in conjunction with a device, instrument or machine, whether mechanical, electrical electromagnetic, electronic or otherwise, and that is taken or performed for *the purpose of assessing or purporting to assess the credibility of a person.*

[emphasis added]

4. Although section 103(2)(c) of the *Labour Relations Act* gives the Board the power “to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not”, it is worth noting that courts in Canada have largely refused to admit polygraph evidence. (See *Phillion v. The Queen*, [1978] 1 S.C.R. 18, *Prince v. Home Insurance Company* (1985), 11 C.C.L.I. 294 (N.B.C.A.); but see *R v. Beland and Phillips* (1984), 15 D.L.R. (4th) 89 (Quebec C.A.) currently on appeal to the Supreme Court of Canada and *R v. Wong* (No. 2) (1976), 33 C.C.C. (2d) 511 disapproved of by the S.C.C. in *Phillion, supra*). Several arbitration awards have dealt with the issue and in most of those cases the polygraph evidence was rejected. (See Ontario Crown Employees Grievance Settlement Board, in *Re: Adams*, 140/77 dated August 10, 1978 (Adams); *Re Canada Post Corporation* (1982), 8 L.A.C. (3d) 60 (Burkett); *Kingsway Transports Ltd.* (1983), 10 L.A.C. (3d) 440 (Brandt); but see *Re Corporation of the Regional Municipality of Haldimand-Norfolk* (Grandview Lodge) (1985), 20 L.A.C. (3d) 131 (Samuels).)

5. There are a number of policy considerations which, in our view, mitigate against the introduction of such evidence in Board hearings. Most importantly, the reliance by an employer on such evidence would as a practical matter put the employee at a tactical disadvantage and lead, indirectly, to employees feeling they ought to submit to such tests in order to make the credibility issue equally competitive. The litigation would likely, assuming both parties could afford it, devolve into an assessment of the technical reliability of polygraph testing rather than of credibility. In our view, the scientific evidence of reliability would have to be overwhelmingly positive to outweigh the inevitable result of employees feeling no alternative but to submit to polygraph testing. This would fly in the face of the clear legislative intent contained in the *Employment Standards Act*, that no employee feel under pressure to take such a test.

6. It is important to note that the refusal to admit such evidence does not unfairly restrict the respondent’s ability otherwise to make his case. He will be called as a witness, will give evidence under oath, will be subject to cross-examination and will be subject to the Board’s observation of his demeanour as he testifies. None of these safeguards exists in the disclosure of his statements to the administrator of a polygraph test where the questions and answers are taken in privacy and without scrutiny either by the adjudicators who must assess his credibility or his adversaries who may wish to challenge it.

7. In the absence of a serious flaw in the existing adjudicative process for the determination of credibility and weight, and while recognizing the fallibility of those responsible for making these judgments, there is no justification for the introduction into Board hearings of “trial by polygraph”, an unreliable instrument which may not be of assistance, may unfairly prejudice either party, and may cause the unintended and undesirable erosion of the protection given by statute to employees from polygraph testing. The existing process, whatever its imperfections, attempts to strike a fair balance to all parties in the adversarial forum. Anything that endangers this balance without providing an overriding benefit should, as a matter of policy, be rejected. We therefore find that the polygraph evidence of Joseph Schochet is not admissible.

#### **DECISION OF BOARD MEMBER JAMES A. RONSON;**

1. In this case the *Labour Relations Act* places the onus on the respondents to prove that they did not commit an unfair labour practice. To further the purpose of that onus, the



Board does not force the complainant to first prove a *prima facie* case. Rather the Board forces the respondents to present their case first. Third and last, if the Board finds that there is the slightest bit of anti-union animus in the motive behind the employer's actions then the decision to terminate the employment of the grievor is "tainted", and the employer has violated the Act.

2. The "taint" theory illustrates, in itself, that the Board recognizes the difficulties faced by a trier of fact in making a finding relative to motive. Rather than determine the predominant motive behind a decision, the Board adopted a policy that avoids this difficult decision-making problem.

3. Given the above, there is no wonder that many feel that the Act pays lip-service to the *Canadian Charter of Rights and Freedoms*

"...any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."  
[s.11(d)]

4. In this case a named individual respondent seeks to introduce evidence of his innocence. There is no valid policy reason (given our new Charter of Rights) that could ever preclude an accused person from seeking to introduce *relevant* evidence tending to prove his or her innocence.

5. The Board has not reached the stage of receiving evidence regarding the admissibility of a polygraph test. We are advised that Mr. Schochet will give *vive voce* evidence. At this stage, the Board is denying Mr. Schochet the opportunity of leading evidence which could very well be supportive of his *viva voce* evidence. The Board is making a finding regarding relevancy without even listening to the expert evidence on the subject.

6. The decision of the majority speaks of "trial by polygraph" or "trial by machine". In my opinion that is not a valid reason for refusing to determine whether polygraph evidence is relevant. If it were, then the results of blood sampling would not be admissible in paternity cases, nor would spectroscopic analysis of materials be admissible evidence tending to prove the presence of an accused at the scene of a crime.

7. Counsel for Mr. Schochet made a telling point when he pointed out that there is no empirical evidence to show that a human being, acting as a fact-finder, is any more accurate than a polygraph machine. Our system presumes that the fact-finder is always correct. Common sense dictates the opposite. In any event, human fact-finders should never submit to the human reaction that their job could never be assisted by a machine. As fact-finders we should accept whatever help we can get; - not all cases can be decided by "dividing the baby in half".

8. Things are changing so quickly that we at least owe Mr. Schochet the opportunity of trying to show us that his polygraph evidence is relevant. Twenty-five years ago, while at university, I first had the opportunity to use a \$4 million computer that occupied an entire

floor of a large building. Today, an equivalent machine sits on my basement desk at 1/2000 of the price. As technology and experience improve, the human fact-finder cannot afford to get left in the back-water of events.

9. In my opinion polygraph evidence could be especially relevant in this case. We are not dealing with the questions of "HOW" and "WHAT". It is admitted that Mr. Schochet terminated the employment of the grievor. We are dealing with the "WHY" question - what motivated Mr. Schochet to do what he did. In many such cases the Board is forced to infer the motive of anti-unionism from other facts. As the Board has noted, rarely does someone admit that their motive was "tainted" by anti-union reasons. Since we are dealing with Mr. Schochet's motive, and that only, there is no pressure on the union to call its own polygraph evidence in this case. And when we are dealing in inferences (from evidence that is often circumstantial), why should not relevant polygraph evidence be added to the pot?

10. I see no valid reason in this case why Mr. Schochet should not be allowed to attempt to lead relevant polygraph evidence regarding his lack of wrongful motive, and I would not prevent him from so doing at this stage of the proceedings.

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**0765-85-R United Electrical, Radio and Machine Workers of Canada (UE),  
Complainant, v. Pre Fab Cushioning Products Ltd., Respondent**

**Discharge for Union Activity - Duty to Bargain in Good Faith - Unfair Labour Practice  
- Whether grievor discharged for picket line misconduct - Whether discharge for union activity  
- Whether failure to reinstate pursuant to no reprisals clause in settlement bad faith bargaining**

**BEFORE:** *Paula Knopf*, Vice-Chairman, and Board Members *F. C. Burnet* and *W. F. Rutherford*.

**APPEARANCES:** *Frank Piserchia* and *Pat MacNeil* for the complainant; *John Williamson* and *Sheldan Caplan* for the respondent.

**DECISION OF PAULA KNOPF, VICE-CHAIRMAN AND BOARD MEMBER F. C. BURNET;** February 7, 1986

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the grievor, Christopher Robinson, was dismissed by the respondent contrary to section 66 of the Act and further that the respondent's conduct amounts to a breach of sections 1(2), 3, 15, 64 and 70 of the Act. The facts which gave rise to the complaint surround the culmination of a two-month legal strike by the complainant union against the respondent.

2. The Company manufactures urethane foam parts for the foam furniture industry. Its operation is located in Downsview, Ontario. The Company has been in existence since 1958. The union gained bargaining rights in 1976 and has maintained a collective bargaining

relationship with the Company since that time. On February 4, 1985, the Union commenced a legal strike against the Company. The strike continued through to March 25, 1985. The previous collective agreement had expired in October 1984. The strike was a difficult one for both sides. Picket lines were maintained throughout and police were often patrolling and observing the picket lines. Management maintained constant contact with the police "strike squad". A number of criminal charges were laid resulting from incidents on the picket line. The company maintained a video camera observing the picket areas at all times. Feelings ran high because the Company continued operations throughout the strike by employing replacement employees and some of its previous employees who were willing to continue to work despite the Union's strike action. To facilitate the transportation of the replacement and continuing workers into the manufacturing areas and through the picket lines, management personnel from the Company drove vans and other vehicles across the picket lines carrying those workers in and out of the plant daily.

3. The grievor was a machine operator and had worked for the Company for six years. From 1981 to 1982, he was a shop steward. His tenure in this job was less than one year. He saw his main responsibility while holding that position as the handling of safety complaints. When the Union held its meeting to commence the strike in 1985, the grievor was elected as one of the picket captains. He was fairly active on the picket line during the strike and management was aware of his presence. However, his position as a picket line captain was unknown to management.

4. The incidents which precipitated the complaint occurred on the picket line on Friday March 22, 1985. There is a great deal of dispute in the evidence as to what exactly occurred on that day. Therefore the evidence must be reviewed in some detail.

5. Irving Himel is the President of the respondent company. He spent a considerable amount of time during the strike driving a van carrying workers across the picket lines. The van he drove was a blue, GMC, ten-passenger, side panel vehicle (hereinafter referred to as the Himel van). It had two ordinary front doors and a large sliding door on the passenger side at the back area of the van. Gauze curtains covered the windows and divided the driver and front passenger seats from the rear of the vehicle or the passenger compartment. On March 22, 1985, Mr. Himel was driving the van filled with workers out of the property at the end of the day through the north exit. As he waited in line, he was approached by Mr. Frank Moralez who had been in the picket line. Mr. Moralez began talking to Mr. Himel. Mr. Himel remained seated in the van; he spoke through the open window of the driver's side of the van. From an exchange of pleasantries, the two men began to discuss the strike and the desire of all to have it resolved. Both gentlemen described this as a "conversation" as opposed to an argument and Mr. Himel goes so far as to describe it as "friendly". Mr. Moralez' evidence corroborates this. During this conversation, the grievor, Mr. Robinson, approached Mr. Moralez and clearly wanted him to stop talking to Mr. Himel. All the evidence is in agreement that Mr. Robinson told Mr. Moralez to return to the picket line. There was an exchange of words between Mr. Moralez and Mr. Robinson resulting in physical contact between them of a minor, non-violent nature. Mr. Moralez wanted to continue the conversation with Mr. Himel.

6. It is at this point that the controversy in the facts develops. Mr. Himel says that Mr. Robinson then spat through the open window of the van past Mr. Himel, but looking at him all the time. Mr. Himel recalls an exchange of words in which he addressed Mr. Robinson



as “Chris” and being told to call him Mr. Robinson. Mr. Himel says that the grievor then walked around the front of the van, making fists, and proceeded over to the right hand side of the van. Mr. Himel says that he then saw Mr. Robinson grab the handle of the sliding door to the passenger compartment to the van, open the door and stick his head and upper torso into the van. Mr. Himel says that Mr. Robinson then grabbed at a female passenger who proceed to “scream beyond recognition.” Mr. Himel recalls hearing Mr. Robinson yell, “we’re going to get you, f—ing scabs.” A lot of commotion arose and Mr. Himel yelled for the door to be closed, and told Mr. Robinson that he was “finished with the Company” or words to that effect. The door was then closed and Mr. Robinson walked away.

7. Two other Company witnesses testified as eyewitnesses to this incident. Mrs. Le was a passenger in the back of the van at the time. She recalls the van stopping at the picket line and Mr. Himel talking to a “small man” who was undoubtedly Mr. Morales. When this conversation was concluded, the sliding door to the passenger compartment of the van was “suddenly opened”. Mrs. Le was frightened and shut her eyes and covered her face with a handkerchief. She doesn’t know who opened the door and says nobody got inside the truck. She was not asked by either party if anyone other than a passenger said or yelled anything in the van and she did not suggest that anyone had. She agrees that there was a lot of commotion and screaming in the van at the time.

8. Mr. Darryl Vukov also testified for the Company on this point. He says he was driving a mobile home at the time. He says he saw Mr. Himel and Mr. Morales engaged in conversation. Mr. Vukov says that he then observed the pickets begin to circle the van so he got out of the mobile home to watch to see if any nails were being dropped on the pavement. Mr. Vukov says that he then observed the grievor go around the van, open the sliding door and put his “upper torso” in the van for ten to twenty seconds. He recalls hearing screams and says that he transmitted a message for help by walkie-talkie to the offices. There is no evidence that help ever arrived. He gave no evidence regarding any spitting by Mr. Robinson, any threats made by Mr. Robinson, or any shaking of the fist by Mr. Robinson.

9. The Union strenuously disputes Mr. Himel and Mr. Vukov’s recitation of the facts. Mr. Robinson himself testified. He categorically denies spitting at or towards Mr. Himel or that he opened the van door. Mr. Robinson says he did go around to the passenger side of the van and noticed an open window so he “eased” his head into the van to see who was inside. He admits to yelling “strike breakers, scabs, give us a chance to earn some money.” Mr. Robinson says that that is what all the picketers always yelled at the vehicles as they crossed the lines. In cross-examination, Mr. Robinson added that all he could get inside the van were his arms and that he reached for the curtains dividing the front portion of the vehicle and the passengers in an attempt to see and identify the passengers. Mr. Robinson says that he was then slapped by Mr. Irwin Himel who told him not to put his hands on the vehicle and also that his employment was terminated. That was the entire extent of the incident according to Mr. Robinson.

10. Mr. Morales testified for the Union. He was active in the Union at that time, but he is now a member of management in the position of foreman. Mr. Morales’ evidence is that when Mr. Robinson went over to the passenger side of the van, the front window was open. Mr. Morales says that he saw Mr. Robinson put his head and one hand into the vehicle and try to open the curtains. Mr. Morales saw Mr. Himel slap Mr. Robinson and tell him that he had “better look for another job starting Monday.” Mr. Morales did not see Mr. Robinson

spit at Mr. Himel at any time. Further, Mr. Moralez says he did not see the sliding door open at any time and says he could not see into the back of the truck because of the gauze curtains dividing the front seats from the passenger compartment.

11. Ken Bertie was also on the picket line at the time. He says that he saw Mr. Robinson put his hand, but not his head, through the window and ask Mr. Himel how many "scabs" were in the van. Then, Mr. Bertie says the sliding door was opened, but he believes it was opened by one of the passengers because Mr. Robinson was standing by the front door at the time.

12. Mike Dropulic was the last witness called by the Union. The purpose of his evidence was clearly to contradict that of Mr. Vukov. Mr. Dropulic claims that the Himel van exited from the north entrance to which all other witnesses agreed. However Mr. Dropulic adds that the Vukov mobile home exited from the south entrance on the day in question. Therefore, if Mr. Dropulic is right Mr. Vukov could not have seen what he alleges or even been there at the time. The difficulty with Mr. Dropulic's testimony is twofold. First, Mr. Vukov was never cross-examined on this point. Apart from the inherent unfairness that this would create, the Board has not had the benefit of knowing what Mr. Vukov would have offered as an explanation. Secondly, Mr. Dropulic says that he was on the picket line until 8:00 p.m. that evening and that the Vukov mobile home only left the premises once and that was at 4:00 p.m. All the other evidence presented by the Union is that the relevant events occurred around 4:30. Therefore, it could have been that Mr. Dropulic is thinking of another incident. Because of these factors, we do not find Mr. Dropulic's evidence to be of any persuasive value or assistance.

13. Even setting aside the evidence of Mr. Dropulic, the Board is faced with a mass of evidence from the parties that contains contradictions within their own cases and which contradicts each other's cases. The Company's evidence is flawed in that none of its witnesses corroborate Mr. Himel's allegation of Mr. Robinson spitting, uttering threats or shaking his fists. Further, it is hard to accept that Mr. Himel could have observed Mr. Robinson opening the sliding door and entering the van given the gauze curtains that all other witnesses acknowledge would divide his view from the passenger compartment. We are also troubled by the Company's unexplained failure to produce video tapes which apparently would have recorded an incident such as this and which could have assisted in the proceedings.

14. On the other hand, the Union evidence is not consistent. Mr. Robinson and Mr. Moralez would leave us with the impression that the sliding door was never opened, yet their own witness Mr. Bertie acknowledges that the door did open. Mr. Bertie had the best perspective of all to judge this.

15. However, what is clear and what we must conclude is that Mr. Robinson did at least put his head and arms into the Himel van for the purpose of seeing who was in the van and he yelled at the passengers. Given Mr. Bertie's evidence together with that of Mrs. Le, it must also be found that the passenger sliding door of the van was opened, but the evidence is too contradictory for the Board to conclude that Mr. Robinson was responsible for opening it. It was also clear that Mr. Robinson's conduct frightened the passengers and created a real commotion. However, the alleged threat attributed to Mr. Robinson by Mr. Himel was not substantiated by any other witness and cannot be accepted as attributable to Mr. Robinson. While such words may have been uttered at the time by another picketer in the immediate

vicinity, we cannot accept that the evidence supports a finding that it was said by Mr. Robinson.

16. It is clear that no matter what actually occurred, Mr. Himel's reaction was to tell Mr. Robinson that he was fired and Mr. Robinson did hear that on March 22. However, there is also a dispute as to when Mr. Robinson was actually fired. Mr. Robinson says that Mr. Himel told picketers that their employment was terminated quite often throughout the strike and that no one took it seriously. Mr. Robinson considered this no different than any other time and also did not take it seriously. Mr. Moralez also said that Mr. Himel would on occasion tell picketers that they were "out of jobs" in response to name-calling, but again no one took it seriously. The Union was not immediately notified of Mr. Robinson's firing. However, Mr. Himel definitely considered that he had fired Mr. Robinson on the spot and advised other members of management of this the same day.

17. The next important event in this case occurred the following day, Saturday March 23, 1985. The parties had scheduled negotiations for that day. The negotiations resulted in the parties signing Minutes of Settlement of the strike on March 23. During the negotiations, the Company spokesman was a lawyer. He was not advised by anyone from management that Mr. Robinson had been terminated the previous day. The Union was not aware of it at the time either. Yet one of the terms of the Minutes of Settlement that had been proposed by the Company and accepted by the Union was a "no reprisals clause." The clause reads:

The parties agree that there shall be no reprisals or repercussions by either side.

Further, under the settlement, the terms would be effective upon ratification. There were no retroactive provisions in the minutes. The Union ratified the agreement on Tuesday, March 26 and the return to work commenced the following day.

18. In any event, the grievor testified that he did not consider himself fired as of March 22 and he awaited recall after the strike. By April 8 he knew from information handed out by the Union that the settlement had provided the work in the plant to be offered in accordance with the seniority provisions. However, when Mr. Robinson appeared at the work place on April 8, he was told by Mr. Gurley, the Plant Manager, that his employment had been terminated on March 22. Mr. Robinson claims not to have received the Company's letter to him confirming the termination. The letter was dated March 25 and mailed on March 26. The Union itself first became aware of the termination on April 8 and filed a grievance the same day.

19. The Union took the grievance to arbitration under section 45 of the *Labour Relations Act*. The matter came before Mr. O'Shea. The Company had taken the position that the collective agreement only came into effect upon ratification on March 26 so that at the time of the firing, i.e. March 22, Mr. Robinson was not covered by a collective agreement and thus the matter was inarbitrable. The Union argued that the discharge was only effective after the official notice of discharge was sent which would have been March 26 or after. Therefore, the Union argued that Mr. Robinson should be covered by the collective agreement which came into effect on April 26. Arbitrator O'Shea heard the Company's submissions on arbitrability and evidence on the merits of the case. The Union elected to call no evidence on the assumption that a preliminary ruling would determine whether the merits need be addressed. Mr. O'Shea concluded:



On the uncontradicted evidence before me I find that the grievor was advised by Mr. Himel on March 22nd, 1985 that "as far as I am concerned, you are fired". Since this statement was made by Mr. Himel, who was known to be the President of the Company, and since the statement was made immediately following an incident on the picket line, in the absence of any evidence which would cause the statement to be qualified or contradicted, I must find that on March 22nd, 1985 the grievor was fully aware that he had been discharged by the President of the Company. I further find that Mr. Himel had authority to discharge the grievor and that the grievor must have been aware that the President of the Company had this authority. I also find that the grievor's discharge on March 22nd, 1985 was "confirmed" by letter dated March 25th, 1985.

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Since I have found that the grievor was effectively made aware of his discharge on March 22nd and since I have also found that no collective agreement was in existence (or subsequently made effective) between the parties at that time, I must accordingly find that there could be no violation of a collective agreement between the parties as contemplated and required by the provisions of Section 45(1) of the Labour Relations Act when the grievor was discharged by the Company.

20. Once the unfavourable arbitration decision was received, the Union launched these proceedings. The complaint contains allegations of anti-union animus directed against the grievor. It is undisputed that this complaint is the first time that these allegations were raised to the Company. The allegations that the grievor makes against the Company, individuals and management are serious in that they allege intimidation in the exercise of union rights. It is alleged that Mr. Robinson felt compelled to step down from his role as a shop steward, after serving less than one year in 1982 because the maintenance foreman, Joe Brown, and the Plant Manager, Gene Gurley, accused the grievor of being a "troublemaker" and told him to "mind his own business." Further, it is alleged that racial remarks were made to the grievor in this context. In addition, the grievor alleges that following his victory in a previous arbitration case in 1983 when he had been reinstated by an arbitrator, Mr. Gurley threatened to do anything in his power to have the grievor terminated. Finally, the grievor alleges he was threatened in the picket line in 1985 by both Irving and Melvyn Himel with regard to continued employment.

21. The employer's position regarding the 1981-1983 allegations are a complete denial and a questioning of how seriously the allegations should be taken given that they were never raised in any form prior to these proceedings. Regarding the picket line alleged threats, Mr. Irving Himel testified about conversations with many picketers wherein he warned that jobs may be lost due to the Union's position. Melvyn Himel denies ever threatening the grievor and on the contrary, admits to telling the grievor that he was welcome to return to work.

22. It is undisputed that one other person was fired during the strike. He did not return to work. The only evidence the Board knows about this incident was that this person was also fired by Mr. Himel for allegedly threatening to kill him. The Company and the police and members of the union also laid criminal charges arising from the picket line activities which proceeded to the Provincial Court after the settlement was achieved.

23. The only other evidence that should be commented upon concerns the grievor's disciplinary record which was introduced by the Company. Having said that, it should be immediately pointed out that there is no suggestion that the record was even considered by Mr. Himel when he discharged Mr. Robinson. Therefore, it is of no assistance to the Board

in determining whether there has been a violation of the Act. So, while the evidence was admitted, we have given it no weight in our deliberations. The only evidence of past conduct that is of any importance is that Mr. Himel had seen the grievor climb upon the mobile home in the early stages of the strike and apparently try to enter it as it crossed the line. Mr. Himel says he threatened to fire Mr. Robinson if he did such a thing again.

### The Argument

24. The Union argues that the grievor was dismissed because of his union activity and involvement as a shop steward from 1981 to 1982 and as a picket line captain during this 1985 strike. It was suggested that the only reason why the Company would wait for the last minute of the strike to terminate the grievor was because of his Union activities. It was suggested that the Company was simply waiting for an opportunity to get rid of the grievor. The grievor's conduct on March 22 was submitted to be "no misconduct" so that there must be another, anti-union motivation behind the termination. Further, the Company's failure to reinstate the grievor despite the "no reprisals" clause was said to be an indication of bad faith bargaining. The Board was referred to the case of *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316.

25. Counsel for the Company argues that the evidence establishes that the grievor was simply fired because of his threatening conduct on the picket line on March 22, 1985. The fact that no other person holding union office was disciplined or discharged was said to indicate that there was no anti-union motive in this discharge. Further, it was suggested that it is illogical to accept that the Company was "gunning for" the grievor, when the grievor's own evidence is that he was asked repeatedly through the strike to return to work. Finally, it is stressed that the Company was unaware of the grievor's status as a picket line captain and that the grievor's past union activity was of no concern to the Company in this discharge. Regarding the "bad faith bargaining allegations", the respondent submits that both the facts and the O'Shea award make it clear that the terms of the collective agreement reached by the parties were not intended to cover a discharge which had taken place before the contract came into effect. The terms of the Memorandum of Settlement were clearly not intended to be retroactive. Thus, it was submitted that the contract should not be read in such a way that would imply that it could have been breached or sabotaged by the discharge of the grievor the day before it came into effect. Further, the fact that the union has not alleged similar breaches for the discharge of the other employees or the Company's willingness to proceed to criminal courts on charges laid during the strike is said to be evidence that the Union itself recognizes that the "no reprisals" clause was intended to cover the future and not any decisions that had already been made. Counsel referred the Board to its previous decisions in *John T. Hepburn Limited*, [1985] OLRB Rep. Jan. 75 and to *Rehou Plastiks of Canada Limited*, [1979] OLRB Rep. Nov. 1104.

### The Decision

26. Section 66 of the Act provides:

66. No employer ...

(a)

shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

27. Pursuant to section 89(5) of the Act the respondent is given the burden of establishing that its discharge of the grievor was free of the motivation referred to in section 66:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

28. The nature of the onus on the respondent was explained in the case of *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 at paragraph 17:

... The effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts - first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

29. In *Fielding Lumber Company*, [1975] OLRB Rep. Sept. 665, at paragraph 19, the Board noted that:

... the Board must only be concerned with the motivation of an employer and cannot pass judgment on the fairness of its actions. The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* - a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must also be observed that in assessing an employer's declared motivation due regard must be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.

The "process of inferential reasoning" was discussed in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, at paragraph 5:

5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.*, case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who



has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement of inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if *The Labour Relations Act* has been violated.

30. The respondent is under no obligation to establish that it had just cause when Mr. Himel discharged Mr. Robinson. The responsibility of the respondent is to satisfy the Board that the discharge was not for any improper motive.

31. As pointed out above, we have not accepted the employer's recital of the events of March 22 as being completely accurate. There may have been some embellishment on the part of Mr. Himel to strengthen his case or he may have been telling us what was simply his impression of a series of speedy and emotional events. This inevitably raises some question as to the veracity of the respondent's case and its claim to have had no improper motive in the firing.

32. However, the onus on the respondent is to satisfy us of no improper motive on the balance of probabilities. Weighing all the evidence and the facts that have been established by the evidence, we must conclude that the respondent's decision to discharge Mr. Robinson was not in any way motivated by Mr. Robinson's union activities.

33. Mr. Robinson's union activities were not very significant in themselves. His duties as a Union steward through 1981 to 1982 were conducted without the suggestion of interference or reprisals from the Company up to a certain point. The grievor's allegation that he then resigned the union position because of threats and intimidation from management simply cannot be accepted at this time. No grievances or complaints were filed by Mr. Robinson or the Union in 1982 despite the fundamental seriousness of those allegations. For such allegations to surface three years later in a case such as this with no prior notice or complaint having been given, casts far too much doubt on the credibility of those allegations. The alleged reprisals for legitimate picket line activities are also unacceptable. First, the grievor's own evidence is that management was continually telling people that their jobs were in jeopardy or "over" because of the strike and that no one took it seriously. Secondly, although the grievor may have been a picket line captain, he was less active than other union members on the line who held no official status and we accept that his status was unknown and not considered by management when the decision was made to fire him. Other picketers who were even more active and who even committed criminal offences on the line were not discharged.

34. It is possible to speculate that the Company may well have wished to get rid of Mr. Robinson as an employee, especially given their failure to win a discharge arbitration against him in 1983. Employers rarely welcome the obligation of re-employing people who they have tried unsuccessfully to fire. But that does not suggest or imply a motive which is contrary to section 66. It does not even imply that the motive is the reprisal for exercising the right to grieve the discharge. It simply implies that the employer may seize another opportunity to discharge an unwanted employee when and if the situation arises. The function of this Board is not to assess whether such a discharge is just or equitable. Even if it is unfair, this does not mean it is unlawful. But in assessing the reasons actually given by the Company

for deciding to fire Mr. Robinson in March, 1985, and considering the question of fairness for the purposes of assessing the true reasons of the employer's conduct, it cannot be forgotten that the discharge was allegedly for violent and intimidating conduct towards those performing work for the employer during the strike. Again, as pointed out in the *Hepburn* decision, an employer's interest in the safety and wellbeing of its work force is well recognized. In *Gates Rubber of Canada Limited*, [1978] 18 L.A.C. (2d) 412 (O'Shea) this well-established proposition was set forth:

The mere fact that an employee is engaging in a lawful strike does not give him licence to commit acts of misconduct which would not otherwise be tolerated by his employer.

By the grievor's own admission, he entered the van partially for the purpose of trying to see who was in there. He tried to open the protective gauze curtains. He knew or had to have known that this would intimidate the passengers. This may well have been why he did it. It is reasonable to assume that the employer would discipline him for such conduct. Indeed, when he had done a similar act once before, he had been told that he could be fired for this.

35. The evidence does not support a conclusion that the employer's decision was motivated by any of the grievor's Union activities. We are satisfied that it is more probable than not that the respondent's decision to discharge the grievor was not a response in any way to Mr. Robinson's Union activities but instead was a response to his conduct at the van on March 22.

36. With regard to the allegations that the Company has breached the Act by its failure to reinstate the grievor in the face of the "no reprisals clause" this too cannot be accepted. The Memorandum of Settlement is clear on its face to have only prospective effect. It is unfortunate that the parties did not turn their minds to the question of Mr. Robinson's discharge in their final negotiating meeting of March 23, 1985 so that the issue could have been discussed as is often the case in the final stages of a strike. But the Company's failure to notify the union of the discharge is not in itself a breach of the Act. Nor, do we imply any sinister conduct in that regard. The fact that the Union has not challenged the continuing criminal proceedings against others does seem to indicate a recognition that such decisions made during the strike were not affected by the "no reprisals" clause.

37. Therefore, we find no evidence to support a finding that there has been a breach of sections 1(2), 3, 15, 64, 66 or 70 of the Act. In all the circumstances, the complaint is dismissed.

## **DECISION OF BOARD MEMBER W. F. RUTHERFORD;**

1. I dissent.

2. On my assessment of the evidence I would have found the company in violation of section 66(a) of the Act, which reads as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because

the person was or is a member of a trade union or was or is exercising any other rights under this Act;

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**2084-85-OH** Peter C. Buttenaar, Complainant, v. **The Municipality of Metropolitan Toronto**, J. Ritchie; L. Lipp; J. Carnduff; K. F. Martelock; J. Horvath; J. Lees; P. Ferguson; F. J. Horgan, Respondents, v. **Canadian Union of Public Employees Local 79**, Intervener

**Health and Safety - Practice and Procedure - Point of time when election between arbitration and s.24 complaint - Mere notice of intention to proceed to arbitration not completing election - Election requiring some conduct pursuant to notice - Selecting of arbitrator and setting of hearing dates held to constitute election - Board reviewing union's right of carriage of arbitration and workers' rights under s.24 of safety legislation**

**BEFORE:** S. A. Tacon, Vice-Chairman, and Board Members R. J. Gallivan and P. V. Grasso.

**APPEARANCES:** R. W. Kuszelewski and P. C. Buttenaar for the complainant; Harry Poch for the respondents; Harold F. Caley for the intervener.

**DECISION OF THE BOARD;** February 20, 1986

1. This is a complaint filed pursuant to the *Occupational Health and Safety Act* (hereinafter referred to as the OHSA) alleging violation of section 24(1) of that Act. At the hearing, counsel for the Canadian Union of Public Employees, Local 79, sought intervener status. The respondent withdrew its initial objection to that request, after clarification from the union counsel. The complainant raised no objection to the status sought by the union. Accordingly, the Board hereby adds the intervener to the style of cause of these proceedings in the context of counsel's statement with respect to the reasons for and extent of participation.

2. The respondent, by way of preliminary motion, sought dismissal of the complaint as against all respondents, or, against the individuals named as respondents, or, in the alternative, adjournment of these proceedings pending the outcome of arbitration. The Board heard the submissions of the parties and reserved its ruling.

3. Before setting out the submissions of the parties, it is useful to briefly sketch the following background facts, which were not in dispute.

4. The grievor received notice of "termination" in February 1985, effective March 7, 1985. (The Board's use of the word "termination" does not imply any conclusion as to whether the grievor was terminated contrary to the OHSA, as the grievor claims, or laid off for lack of work, as is the respondent's position). A grievance was filed February 28, 1985, stating "I have been terminated without just cause, (as of March 7, 1985)" and seeks redress



“to be reinstated without loss of benefits, wages or seniority”. A step 2 response denying the grievance was issued over the signature of F. J. Horgan, Commissioner of Works, dated April 4, 1985. That reply, filed with the Board, details the respondent’s view of the complainant’s work history from May 26, 1983 to date of “termination”, in particular, the complainant’s illness and “safety concerns” in November 1984. The grievance proceeded through the remaining steps, including the Step 3 response dated July 23, 1985, and the union notice of intent to proceed to arbitration, dated July 26, 1985. The parties discussed the format of the arbitration, whether sole arbitrator or three-person board. The latter format was eventually agreed upon, the nominees and chair appointed. The hearing is scheduled for June 11, 1986. The complainant filed the instant complaint with the Board on November 18, 1985.

5. The respondent submits that section 24(2) of the OHSA requires the worker to elect between proceeding to arbitration (if he/she is covered by a collective agreement) *or* filing a complaint with the Board. Further, it was argued the complainant, by proceeding through the grievance process to the point where an arbitration hearing was scheduled, has *already* elected the arbitral route and, thus, cannot now proceed before the Board in respect of the same matter. Counsel referred to the following cases in support: *Reed Limited, Furniture Division*, [1978] OLRB Rep. Jan. 1, 78 CLLC 16,130; *Inco Metals Company*, [1982] OLRB Rep. May 681 (the Wawia case). With respect to the individual named respondents, counsel contended all were acting in their respective capacities as employees or officials of the respondent and, therefore, the Municipality of Metropolitan Toronto was the only appropriate respondent. Moreover, counsel argued the OHSA required the worker to proceed against either the employer or persons acting on behalf of the employer but not both. In the alternative, counsel sought an adjournment of the Board proceedings pending the arbitration to avoid duplication and possibly inconsistent findings of fact, with at least a stipulation that matters dealt with at arbitration not be dealt with by the Board. Finally, counsel contended the relief sought from the Board was available at arbitration, with the exception of items (a), (b) and (e) in the complaint. With respect to these latter items, it was argued the Board had no authority to declare the OHSA was violated (presumably apart from a finding that section 24(1) of the Act was breached by the employer) nor to direct “the respondents to monitor the air at the R.C. Harris Water Treatment Plant, for chlorine, in consultation with the complainant”.

6. Counsel for the intervener asserted section 24(2) of the OHSA required an election in respect of the alleged violation of section 24(1) of that Act between arbitration and the Board as the route for redress, particularly in view of the authority given the Board under section 24(7) to substitute disciplinary penalties. However, counsel submitted that such election had not yet occurred as the arbitration proceedings had not commenced. Further, it was contended, on grounds of fairness to the complainant who was represented by different counsel before the Board than would be the case at arbitration, the complainant should be permitted his election at this point, especially as no party could be said to be prejudiced at this stage.

7. Counsel for the complainant conceded there must be an election under section 24(2) of the OHSA but only with respect to the OHSA issues. That is, the phrase “the matter” in section 24(2) referred not to the imposition of a penalty but whether the worker acted in compliance with the OHSA. If permitted an “election” at this point, counsel indicated the complainant wished to have the Board deal with the OHSA matter. Counsel also agreed there could be no complaint pursuant to section 24(2) prior to the imposition of the disciplinary penalty or as otherwise set out in 24(1). Thus, counsel argued the arbitration, where the union has carriage of the grievance, could proceed with an inquiry as to whether there was an

improper layoff (i.e., layoff out of seniority) in addition to the Board proceedings dealing with the OHSA issues. Counsel conceded, though, that the complainant had not objected to the union's carriage of the grievance or the scheduling of the arbitration. It was asserted the Board was the "expert" forum for dealing with OHSA matters and had broader remedial authority than an arbitration panel or sole arbitrator. Counsel argued that each of the named respondents at least violated section 24(1)(d) and all "knew" of Metro's (alleged) violation of the substantive provisions of the OHSA (i.e., apart from 24(1)). Counsel disagreed with the disjunctive interpretation placed on the phrase "employer or persons acting on behalf of the employer) by the respondent. Finally, counsel stated that, as the matter was now before the Board and the arbitration was not scheduled until June 11, 1986, the case should proceed before the Board.

8. In reply, counsel for the respondent argued the OHSA complaint was integral to the arbitration and, thus, the issues could not be divided as suggested. Moreover, the OHSA issues had clearly been raised throughout the grievance proceedings. Counsel also stressed that the arbitration route had been selected in July, 1985, yet the complainant delayed filing the instant complaint with the Board until November and, it was submitted, had given no reasonable explanation for the delay. Counsel disputed the assertion that the Board's remedial authority under the OHSA was broader than the arbitral remedial authority in the circumstances.

9. Section 24(1) and (2) of the OHSA read:

24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply, with all necessary modifications, to the complaint.

10. It is agreed by the parties, at least with respect to the OHSA issues, that section 24(2) of the OHSA requires an election, i.e., that a worker must choose either to proceed before the Board or the arbitration route. The Board concurs that such an election of forum for redress is clear on the wording of section 24(2); see also *Reed Limited*, *supra*; *Inco Metals*, *supra*; *Black & McDonald Ltd.*, [1983] OLRB Rep. Dec. 1971. The Board, however, does not accept the complainant's assertion that the OHSA issue is severable from the grievance so that the Board could deal with that issue while the arbitration panel hears the layoff issue. The "matter" referred to in section 24(2) is the alleged violation of 24(1), namely, that an employer acted to penalize a worker, as set out in sub (a) to sub (d), because the worker complied with or sought enforcement of the OHSA. That issue of improper (or unjust)

discipline is the “matter” to be heard at arbitration or before the Board. While the respondent asserts that the undisputed fact that the complainant is no longer an active employee is as a result of layoff, there is no doubt that section 24(1) of the OHSA is integral to the grievance should the grievance be adjudicated in an arbitral forum. The grievance form itself refers to “termination without just cause” rather than improper layoff or some such language. Section 24(1) affords workers a right of protection from penalties for invoking the OHSA; that right is enforceable under the legislation either at arbitration or before the Board. The Board also does not accept the complainant’s characterization of the Board as the “expert” forum in respect of alleged violations of section 24(1) of the OHSA. As noted in *Reed Limited, supra*, there can be no general assumptions as to which forum is more suitable. Both are on an equal footing and the statute gives the worker the choice. The Board need not determine precisely whether the remedies available before the Board are broader than at arbitration; rather, the Board regards the remedial authority of either as quite adequate to deal with a violation of section 24(1). Moreover, the Board notes that the Board is *not* the vehicle for enforcing the OHSA beyond the rights in section 24(2). In this regard, the Board comments that the “monitoring” relief requested in item (e) of the complaint would not be appropriate.

11. The Board next deals with the fundamental issue raised in the preliminary motion, namely, at what point does the worker elect his or her forum for resolution of the alleged contravention of section 24(1) of the OHSA. In *Reed Limited, supra*, the Board rejected an assertion that initiation of the grievance process constituted an election. Rather, workers should be encouraged to utilize the grievance process, where such exists, before pursuing the statutory procedure. However, the Board in *Reed* continued, at paragraph 13:

Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

12. The concept of “authorizing” the union to proceed to arbitration was raised in *Inco Metals, supra*, where, although the union indicated initially that the grievance would proceed to arbitration, the grievance was then withdrawn and a complaint filed with the Board. In the circumstances of that case, the Board found that the delay in filing the complaint was not excessive and, further, as there no longer was a “live” grievance ongoing in the grievance procedure, the Board should hear the complaint. Again, though, the Board cautioned:

“as the Board went on to note in *Reed Limited*, however, the employee cannot ride two horses: and once he authorizes the matter to be posted to arbitration, he cannot withdraw that authorization and insist that the matter be filed with the Board instead.” (at paragraph 10).

13. The Board concurs with the reasoning in *Reed Limited, supra*, whereby workers are encouraged to utilize the grievance process, where available, to attempt to resolve the matter before adjudication. Further, the Board agrees with what is essentially a balancing of interests in *Inco Metals, supra*, a recognition that the union has carriage of a grievance but that it is the worker, not the trade union, who is accorded statutory protection under section 24(1) of the OHSA. That is, where a trade union decides *not* to proceed to arbitration, a worker should not thereby be precluded from coming to the Board, at least, in a timely fashion.

14. This Board in this instance need not determine with absolute precision the point at



which an election is made pursuant to the statute. In the Board's view, however, that point is not the initial notification to proceed to arbitration, of itself, but *conduct* by the union in accordance with that notice, conduct such as, the selection of the arbitrator/arbitration panel. Such conduct represents the commitment of the union, as agent for the worker, to the arbitration process, and, therefore, the election of that route for redress. Although the Board recognizes that grievances may be abandoned or settled subsequent to the point noted (indeed, settlement may occur up to the issuance of an arbitration award), the Board regards the test outlined as appropriate. To permit an "election" at any point prior to the actual *commencement* of an arbitration hearing would not encourage the expeditious resolution of a health and safety complaint. Such expeditious resolution is to be encouraged as a matter of public policy. See also *Tecumseh Products of Canada Limited*, [1985] OLRB Rep. Jan. 123, for the impact of delay on the Board's exercise of discretion to hear an OHSa complaint. Furthermore, depending on the scheduling of the arbitration and Board hearings, there could well be costs involved in cancelling the arbitration date(s), costs which it should be noted the complainant would not bear.

15. The Board would add two *caveats* to the foregoing in recognition of the reality that it is the union, not the individual (with relatively few exceptions in collective agreements), which has carriage of the grievance. Firstly, where a worker objects, in a timely fashion, to the union proceeding to arbitration, and instead comes to the Board for relief, the Board may not hold the worker strictly bound by the subsequent acts of the union with respect to the arbitration process. The circumstances of the case, including the manner and timing of the objection, the delay in filing the complaint with the Board, etc., would be relevant factors in determining whether the Board should hear the complaint. Secondly, should the union, after proceeding down the "arbitration" route, unilaterally settle the grievance, the Board *may* consider it appropriate in some circumstances to permit the worker to come before the Board: see, for example *Inco.*, *supra*.

16. On the instant facts, however, the union has proceeded, without protest by the complainant, well beyond an initial notice to arbitrate. The union notified the employer of its intention to proceed to arbitration in July 1985. After some delays as a consequence of deciding upon the format for the arbitration, the grievance is now scheduled for hearing for June 11, 1986. The complainant has not objected to the union's carriage of the grievance; indeed, the complainant wants the arbitration to proceed on the "layoff" issue. Moreover, the instant complaint was not filed with the Board until November 18, 1985. In the circumstances, the Board considers that the complainant has made his election under the statute to proceed to arbitration and is now bound by that election. To continue the analogy in *Reed Limited*, *supra*, while a worker may be permitted to ride two horses during the grievance process, he or she will not be permitted to change horses midstream in the arbitration process.

17. Given the Board's conclusion on the election issue, it is not necessary for the Board to deal with the other matters raised by the respondent in its preliminary motion.

18. Accordingly, this complaint is hereby dismissed.

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**2096-85-M** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant, v. **Vincent Spirito & Sons Ltd.**, Respondent

**Collective Agreement - Construction Industry Grievance - Employer signing voluntary recognition agreement with understanding it was binding only for duration of particular project - Whether result of union misrepresentation - Whether provincial agreement binding on employer**

**BEFORE:** *Paula Knopf*, Vice-Chairman, and Board Members *J. A. Ronson* and *S. O'Flynn*.

**APPEARANCES:** *J. Zanussi* and *M. Pruschowsky* for the applicant; *Pierre Ranger* for the respondent.

**DECISION OF THE BOARD;** February 12, 1986

1. This is an application under section 124 of the *Labour Relations Act* seeking remittances, deductions, welfare, pension and vacation payments from the respondent from April 23, 1985 to date under a collective agreement. At the outset of the proceedings, the respondent took the position that it was not bound by any collective agreement with the applicant union on account of alleged misrepresentations made at the time of the signing of a purported voluntary recognition agreement between the respondent and the Union. Counsel for the respondent indicated that the respondent admits that it would be fully liable under the collective agreement if the agreement was found to be binding and enforceable upon the respondent since the respondent admits to having made no remittances since July, 1985. Therefore, since the only real issue in dispute was whether there was any misrepresentation, the Board proceeded to hear evidence on that threshold issue alone.

2. The undisputed evidence is that the respondent has operated business in the Ottawa area since 1972. It has three divisions dealing with security guards, interior maintenance of buildings, and exterior work, including brick and masonry work. In April, 1984, Vincent Spirito & Sons Ltd. (hereinafter referred to as "Spirito's") were called by VK Masonry, a contractor to do work on an antique masonry wall on Queen Street in Ottawa (hereinafter referred to as the site). Spirito's had worked with VK Masonry for over six years doing one or two jobs per year for them.

3. VK Masonry is a party to the Provincial Agreement for the Ontario Bricklayers, Stonemasons and Plasterers. Article 1(c) of that collective agreement provides:

Any Employer who is a party to this Agreement desirous of sub-contracting any work encompassing the skills of Members of the Ontario Provincial Conference shall only sub-contract same to a sub-contractor who is bound by the Provincial Agreement with the Ontario Provincial Conference.

Up to the events of this case, Spirito's had never been a party to the Provincial Agreement. However, when the Business Agent of the applicant Union, Mike Pruschowsky attended at the site in April, 1985, he noticed masonry work being done. Upon enquiry, he learned that the work was not being performed by Union men. He contacted VK Masonry to get an explanation about an apparent breach of section 1(c) of the Provincial Agreement. Apparently, VK Masonry immediately advised Spirito's to get in touch with Mr. Pruschowsky at the Union directly. It

is conceded by the respondent that it then understood from Mr. Pruschowsky that it could not remain on the site or complete the job unless it employed Union men.

4. The evidence of the Union and the respondent can be summarized quite simply. According to Robert Spirito, a director of the Company, Mike Pruschowsky led him to believe that Spirito's was entering into a voluntary recognition agreement with the Union that would enable Spirito's to hire Union men, allow three of Spirito's current employees to join the Union and only bind the Company until the end of the Queen Street project. Robert Spirito said he tried to make it clear to Mr. Pruschowsky that the Company did not intend to be bound by a contract that would "unionize all its employees" because this would destroy the Company's "competitive edge" with other janitorial and maintenance companies. Mr. Spirito says also that Mr. Pruschowsky assured him that the contract would only cover men working on the site until the job was completed.

5. The Memorandum of Agreement that was signed by Robert Spirito on behalf of the respondent Company clearly binds Spirito's for the duration of the agreement, i.e. until April 30, 1986 and thereafter from year to year unless specified notice of desire to change is given. The Agreement also has the employer recognize the Union as the exclusive bargaining agent for all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the Province of Ontario. The position of the respondent is that despite the clear terms of this agreement, the Agreement should be rescinded because of Mr. Pruschowsky's misrepresentations of the terms of the Agreement to Robert Spirito before the Agreement was signed.

6. Mike Pruschowsky testified that there were no misrepresentations. The thrust of his evidence was that he explained the necessity of entering the agreement to Robert Spirito in order for Spirito's to remain on the site. Further, Mr. Pruschowsky says that he explained to Mr. Spirito that the effect of entering the agreement would be that the Company would be bound in future ICI sector work in the Ottawa area. However, the two men also discussed the fact that most of the masonry work that is done by Spirito's was in the nature of residential work. Thus, Mr. Pruschowsky says that he advised Robert Spirito that this agreement would not bind any of Spirito's residential work and that other arrangements could be made in the future should residential work arise.

7. The Memorandum of Agreement was signed April 23, 1985. Robert Spirito claims he did not read it, trusting to his understanding of what Mr. Pruschowsky had told him. Mr. Pruschowsky did not dispute that Mr. Spirito may not have read the document because Mr. Pruschowsky recalls Mr. Spirito leafing through the document quickly. Although, the evidence is that Mr. Spirito had the document at the meeting where it was signed for approximately 45 minutes before signing it.

8. Mr. Vincent Spirito also testified. He is the founder of the respondent company. However, by his own admission, the contract may have already been signed when he first met Mr. Pruschowsky. Yet, Vincent Spirito confirms that he stressed to Mr. Pruschowsky that the Company was concerned about being bound in all its divisions by any Union obligations. Mr. Pruschowsky does not contradict this and affirms that he explained that the contract would only bind Spirito's employees engaged in masonry work in the ICI sector.

9. It was also clear from the evidence that Robert Spirito signed the contract with the



impression that the agreement only bound his company for the duration of the project on the site. The only question is whether that impression was the result of any misrepresentations by Mr. Pruschowsky or the result of Mr. Spirito simply misunderstanding the import of the agreement he signed.

10. Counsel for the respondent Spirito's argues that the case turns on the matter of credibility. He urged the Board to accept the evidence of the Spirito's over that of Mr. Pruschowsky. Further, it was submitted that the facts should lead to the conclusion that the only reason the Union was contacted by Robert Spirito was to enable Spirito's to hire Union employees to finish the job. Then, Mr. Pruschowsky misrepresented both the nature and the purpose of the voluntary recognition agreement in such a fundamental way that the agreement should be declared void and rescinded. Counsel conceded that the logical extension of his argument would be that if the respondent had not been "misled" by Mr. Pruschowsky, the agreement would not have been signed and they would have abandoned the job site. Counsel referred the Board to the decision of *Eagle Mountain Contracting Limited*, [1981] OLRB Rep. April 442 and cited from the text of *Milner on Contracts* to stand for the proposition that a material misrepresentation is sufficient to rescind a contract.

11. On behalf of the Union, it was argued that if any misunderstanding arose during the course of the signing of the voluntary recognition agreement, the misunderstanding was not the result of any misrepresentations by Mr. Pruschowsky. It was stressed that the Union could have required Spirito's to leave the job site by virtue of the contractor VK Masonry's obligations under the Provincial collective agreement to only subcontract to other employers bound by the same agreement. It was pointed out that this protected the Union membership and gave Mr. Pruschowsky no reason to misrepresent any of the terms of the agreement to Mr. Spirito. Thus, it was argued that the contract ought to be considered binding and enforceable upon the respondent.

### The Decision

12. The threshold question in this case is whether there was any misrepresentation by Mr. Pruschowsky on behalf of the Union towards the respondent that induced Robert Spirito to enter the Memorandum of Agreement. In assessing all the evidence, we must conclude that there were no material misrepresentations. Where the evidence of Robert Spirito and Mike Pruschowsky conflict, we must accept the evidence of Mike Pruschowsky. He was forthright in his testimony. He had a clearer recollection of details and conversations than did Mr. Spirito and he was candid in his admissions. For example, Mr. Pruschowsky admitted that he does not often advise companies that entering into the voluntary recognition agreement that was filed before the Board does not bind them to residential work. Further, we can see no motive for Mr. Pruschowsky to have misrepresented the scope of the agreement to Spirito's. As Mr. Pruschowsky himself pointed out, he did not need to have a voluntary agreement with Spirito's in order to ensure the work for his membership. Spirito's could have been made to leave the job site. The membership of the Union were already protected on the site by the VK Masonry's contractual obligations under the Provincial Agreement and in particular, Article 1(c). This voluntary agreement with Spirito's was not necessary to cover the job site. Thus, there was no incentive for Mike Pruschowsky to misrepresent any of the terms to Spirito's. Nor do we conclude that he did actually misrepresent its terms.

13. In concluding this, we are not suggesting that Robert Spirito was deliberately misleading the Board. Instead, we feel he simply misunderstood Mr. Pruschowsky when Mr. Pruschowsky explained the scope of the ICI coverage. Mr. Spirito must have concluded that it would only affect his company on the one job site, instead of future ICI jobs. But that misunderstanding on Mr. Spirito's part cannot be accepted as arising from any misrepresentations made by Mr. Pruschowsky. Instead, we are satisfied by the evidence that Mr. Pruschowsky advised Robert Spirito that the Memorandum of Agreement would give voluntary recognition to cover any masonry work performed by Spirito's in the ICI sector. The only thing that is not accurate about that representation is that the language of the agreement does appear to cover the residential sector as well. However, the Union is making no claim for such coverage and clearly represented to Robert Spirito that the agreement would only apply to the ICI sector. Indeed, in that particular area, the Union takes the position that a separate residential agreement must be signed in order to cover residential work. Thus, no effective or material misrepresentation exists in this case even if there may have been some inaccuracy in Mr. Pruschowsky's own understanding of the coverage of the agreement. However, the Union is making no claim for such coverage and clearly represented to Robert Spirito that the agreement would only apply to the ICI sector. Therefore, no effective or material misrepresentation exists.

14. Having reached this conclusion, there is no reason why the respondent should not be considered bound by the Provincial Agreement, as of April 23, 1985 and we so declare. The Board shall remain seized with the issue of how much, if anything, is owing to the Union under the Agreement. It is hoped that the parties shall be able to resolve the matter on their own. In the event that this is not possible, this case may be rescheduled at the request of either party within six months of this award.

15. This panel is not seized with the matter.

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**0813-84-R** Local Union 636 of the International Brotherhood of Electrical Workers, Applicant, v. **Wackenhut of Canada Limited**, Alarm Division, Respondent, v. Group of Employees, Objectors

**Certification - Petition - Practice and Procedure - Form 6 notice to employees indicating unit with exclusion of "manager and above" - Supervisor circulating petition - Union amending unit sought to exclude supervisors rendering petition involuntary - Board setting new terminal date - Directory re-posting of new form 6 with amended unit and copy of decision**

*[This decision issued in July 1984 was not published at the time. However, since it has been cited subsequently, it is appropriate to publish it at this time: Editor]*

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *J. A. Ronson* and *J. F. Kennedy*.

**APPEARANCES:** *B. Fishbein* and *R. Riopel* for the applicant; *Stewart D. Saxe* and *Lou Spoucer* for the respondent; *George R. Hall* for the objectors.

**DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON;** July 16, 1984

1. This is an application for certification.
2. The name of the respondent is amended to read: "Wackenhut of Canada Limited, Alarm Division".
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The application as drafted sought certification for a bargaining unit described as:

All employees of the respondent save and except the manager, those above the rank of manager, and sales representatives.

This description drew the line of management exclusion, in other words, at "the manager" and above. There are, below that however, persons occupying the specific positions of "supervisor", and the application on its face left no doubt that these persons were included in the bargaining unit being sought.

5. Prior to the hearing of the application, the Board as usual held a meeting of the parties chaired by a Board officer. The applicant at that meeting requested certain amendments to the bargaining unit it was seeking, including the exclusion of "supervisor". That exclusion coincided with the position of the respondent, and the description of the agreed-upon unit was accordingly amended. As a result, the names of the two supervisors were removed from the list of employees in the unit.

6. One of the individuals so excluded as a Mr. George Hall. That placed Mr. Hall in an immediate predicament, since he was appearing at the officer's meeting as the sole



representative of the group of objecting employees who had filed a relevant and timely statement in opposition to the union's application. As the consequent submissions of the parties unravelled in the hearing before the Board, Mr. Hall candidly acknowledged with respect to the "petition" on which he was appearing, that, after reading the Board's Notice, and having been upset at the prospect of being included in the bargaining unit, he and the other supervisor for their own reasons together took the responsibility for launching the instant petition. He stated to the Board that he doubted whether either supervisor would have gotten involved in a petition had the union not sought to include them in the bargaining unit, and, it now having been agreed that he was a person who ought to be excluded, he indicated that he no longer felt comfortable in performing any further role on behalf of the employees who made up the bargaining unit.

7. It was apparent to all that the statement in opposition circulated by the two supervisors, agreed to be "managerial", could not be given weight to as a voluntary expression of employee wishes. The parties therefore addressed the question whether, in light of the amendment to the unit as posted having occurred only at the hearing, it would be appropriate to re-post the application, with a new terminal date, to reflect what the applicant's intention had actually been. Counsel for the applicant explained that the bargaining-unit description set out in the application had been prepared by his client, and that the inclusion on its face of the two supervisors was simply an error in drafting. Be that as it may, counsel submitted, all that had happened in this case was that some persons whom everyone knew to be managerial had improperly involved themselves in the petition. The sole consequence of that, counsel argued, as in all other cases of management "taint", was that the Board should reject the petition. The Board, counsel pointed out, had not in such circumstances taken the additional step of re-posting for an "untainted" petition notwithstanding the fact that the initial petition had been rejected for reasons wholly beyond the control of innocent employees. Even in the cases of *I. M. Pastechuk*, [1980] OLRB Rep. July 979, and *Carter-Horwood*, Board File No. 0821-80-R released July 10, 1980, where virtually the identical circumstances arose before the Board, the relevant petitions were simply rejected by the Board as failing to meet the test of voluntariness, without any mention of the possibility of re-posting the application to reflect the newly-defined line of managerial exclusion.

8. The Board is wholly in agreement with counsel for the applicant's characterization of the Board's jurisprudence. Where persons who are "managerial", or perceived as "managerial", act on their own initiative to take on a representative role in a "petition", the "petition" fails to meet the test of voluntariness, and that is the end of the matter. In this case, however, the Board itself, in adopting the very specific language provided in error by the applicant, left no doubt whom it was inviting in its Notice to respond to the application and appear at the hearing if they chose. The Form 6, Notice to Employees of Application for Certification, sets out in paragraph one the bargaining unit being sought in the application, and then in paragraph 4 provides:

4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and

- (c) be signed by the employee of each member of a group of employees.

Further, in paragraph 7, the Form provides:

7. Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

We agree with counsel for the respondent that an individual reading that Form would fairly take the instructions in paragraphs 4 and 7 to refer to "employees" as defined in paragraph 1. The result here has been that "objecting" employees have been left with no one at the hearing willing to represent them. Beyond that, we accept that the actions of the supervisors in involving themselves were in large part prompted in this case by the express representation in the Board's Notice that they were sought to be included in the unit. The Board declines to speculate on what may have taken place in the absence of the intervention of the supervisors. The confusion in this case could have been readily avoided by the applicant on the basis of the information that it originally had. As a result, the Board has concluded, as indicated orally at the hearing, that it is appropriate in the unique circumstances of this case to order a re-posting of the application in its amended form, and the fixing of a new terminal date. The only cases cited by the applicant of a truly analogous context were *I. M. Pastechuk*, and *Carter-Horwood*, *supra*. Those cases, however, do not involve all of the unusual factors present here, and it is apparent from the face of them that the issue of re-posting never came up.

9. The Registrar is accordingly directed to have the application re-posted in its amended form, along with a copy of this decision, and to set a new terminal date. The Registrar is further directed to set another hearing date for the application. However, if no additional relevant material is filed with the Board by the new terminal date, the hearing will be cancelled, and the Board will dispose of the application on the material before it.

10. With respect to the parties' dispute over an exclusion for part-time employees, the Board appoints an officer to inquire into and report to the Board on the respondent's history of hiring part-time employees outside of the the school vacation periods.

11. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER J. F. KENNEDY;**

1. I dissent.

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**2237-85-R International Association of Machinists and Aerospace Workers, Applicant, v. Westinghouse Canada Inc., Respondent, v. Group of Employees, Objectors**

**Membership Evidence - Collectors properly instructed on legal requirements in obtaining union membership - Form 9 declarant not intending to mislead Board but not aware of need to make inquiry from collectors - Board reviewing importance of proper inquiries to process - Application dismissed**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *W. G. Donnelly* and *L. C. Collins*.

**APPEARANCES:** *G. Charney, Thomas Steele, Cindy Wilkey, Thomas Lee* and *David Ritchie* for the applicant; *Paul Jarvis, R. Darwin* and *R. Wilson* for the respondent; *M. G. Horan* and *Bruce Reid* for the objectors.

**DECISION OF THE BOARD;** February 7, 1986

1. This is an application for certification.
2. The name of the respondent is amended to read: "Westinghouse Canada Inc.".
3. At the conclusion of their meeting with a Labour Relations Officer of the Board, the parties were aware that the applicant was in a certifiable position, and that the statement filed by employees in opposition to the application was numerically not relevant. Subsequently, however, the Board disclosed to all parties that the objecting employees had filed an allegation of a "non-pay", and that the Board had determined that a *prima facie* case existed for carrying out a formal inquiry into the allegation.
4. At that inquiry, both the employee involved, Ms. Pat Bochert, and the union's collector, Mr. Ted Kewley, testified under summons from the Board, and gave their account of what transpired with respect to the application for membership. The two accounts amounted to flat contradictions with respect to what was done and said on the evening in question, and on the days that followed that event. Ms. Bochert testified that Mr. Kewley had "put the dollar" in for her, as she had no money at the time, and that he contacted her on several occasions thereafter in an attempt to recover the loan. Mr. Kewley testified that at the end of their conversation Ms. Bochert took a dollar from her purse and paid him, and that there was no further discussion subsequent to that. The two versions are obviously irreconcilable. Yet there was nothing in the demeanour of either witness to indicate to the Board that he or she was not telling the truth.
5. It might also be noted that the Board in this case would not have as a last resort the objective evidence of the employee having signed a document acknowledging payment of one dollar, in the event the Board were to find the credibility of the testimony evenly balanced. Compare *The Watson Manufacturing Company of Paris Limited*, [1967] OLRB Rep. Dec. 862; *Sterling Packers Ltd.*, [1972] OLRB Rep. July 705; *Lilo-Rail of Canada*, [1983] OLRB Rep. May 672. Here the space on the receipt indicating "\$1.00" as being paid by the employee was, according to Mr. Kewley, blank at the time he received his cards, and neither he nor Ms. Bochert filled it in. It was in fact filled in in a different ink from the rest of the card,



and the inference from Mr. Kewley's evidence is that it must have been filled in at some later point after he turned the card in to the union. The use of a different pen to fill in the "\$1.00" space, we might add, was, as we advised the parties, true of a number of Mr. Kewley's cards, as well as a number of the cards collected by others. The evidence of Tom Steele, who received the cards, however, was that no cards were completed in that fashion after receipt by the union office, and that the collectors must have been using cards that had been partially filled out as "demo's" in the meetings preparatory to the campaign. That explanation, of course, would not square with Mr. Kewley's account of having begun with blank cards.

6. With respect to the non-pay itself, we would incline toward the evidence of the employee Pat Bochert, on the basis of its internal consistency and overall credibility as an account. In particular, while we recognize that Ms. Bochert eventually became an active "petitioner" opposed to the union (whom she felt had lied to her about the percentage of employees already signed up and who was therefore far from a disinterested witness, we are struck by the fact that she readily admitted that she regarded Mr. Kewley "putting the dollar in for her" as a loan, that she and Mr. Kewley frequently loaned each other small amounts of money for food, etc. at work, and that she felt obliged and intended to repay Mr. Kewley at the time.) There is some question as to whether this even amounts to a "non-pay", on the basis of the Board's current jurisprudence; see *Shaw Festival Theatre Foundation*, [1983] OLRB Sept. 1579; and especially, *Laidlaw Wire*, [1985] OLRB Rep. Oct. 1479.) If an employee opposed to the union decided to conjure up an entire story covering several days for the purpose of impugning the union's membership evidence, or even of indicating that she never really intended to become a member, such acknowledgements of the *bona fide* "loan" nature of the transaction seem less than likely. We do not have to decide, however, whether what ultimately occurred in this case was a "non-pay", as we have dealt with this issue only as a prelude to the problems which have arisen over the Form 9, and the reasons why the Form 9 is designed as it is.

7. Mr. Kewley was one of the leading co-ordinators of the organizing campaign, all of which was carried out by in-plant organizers. Mr. Kewley actually collected the largest number of cards amongst the organizers, and it was he who received the cards from the other collectors and delivered them to Tom Steele, the Ottawa-area business representative in charge of the campaign for the applicant. Mr. Kewley testified that Mr. Steele had emphasized several times with the organizing committee the importance of getting the dollar, as he had had cases thrown out in the past over it. Mr. Steele did not, however, instruct Mr. Kewley to make any inquiries of the other collectors for the purposes of the Form 9 Declaration Concerning Membership Documents, and Mr. Kewley made none. Neither did Mr. Steele make any inquiries of Mr. Kewley when he turned over the bundle of cards at the end of the campaign. Rather, both men clearly assumed that, because the number of cards and the number of dollars matched, no further inquiries were called for.

8. The critical paragraph of Form 9, paragraph 3, reads:

(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on

his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

Mr. Steele testified that he had been working for the union for the past 20 years. Until recently, however, he had been in the Toronto office, which employed a full-time organizer, so that this campaign in Renfrew was the first one that he had had the responsibility for in years, and the first occasion to become involved once again with the Board's procedures for authenticating and filing membership evidence. Mr. Steele testified that he and others went over and over the cards to make sure they were not deficient in any way, and when he discovered that some of the "signatures" had been printed, he sent the cards back to be re-signed. Mr. Steele also testified that he had exhorted the in-plant committee at their one and only organizing meeting to delay the campaign until more training sessions could be held, but the committee was adamant about starting at once. Mr. Steele accordingly drilled them on what spaces had to be filled out on the card, and the importance of getting the dollar in every case.

9. Mr. Steele was a crushingly candid witness, and it was obvious that even at the point of giving his evidence, he was not aware of the necessity, for the purposes of the Form 9 declaration, of making inquiries of the persons who actually collected the dollar. Indeed, when asked in cross-examination whether he had *read* the Form 9 before he signed it, he responded: "Probably".

10. Counsel for the applicant acknowledges the problems that the evidence has disclosed on the Form 9 inquiries, but argues that the Board should order a vote (the same result as would flow if the Board considered it appropriate to discount all of the cards collected by Mr. Kewley) on the grounds that:

- (1) the applicant filed cards for such a large percentage of the bargaining unit;
- (2) diligent efforts were made by Mr. Steele, in his own way, to ensure that a dollar was collected in each case; and
- (3) there clearly has been no attempt by the Form 9 declarant to mislead the Board.

11. It is difficult to talk about the level of membership evidence when the reliability of that very evidence has been placed in doubt however. And the present case bears remarkable similarities to another case of the Board decided not long ago, in *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656. That case is worth referring to at length, both for its facts and for its review of the law.

3. A potential problem with the Form 8 [now 9] Declaration surfaced during an examination of the circumstances surrounding the solicitation of the membership card of Joe Solazzo. Mr. Solazzo's membership card is signed in the two places as required, and the confirming collector's signature is that of Wendy Woods. Ms. Woods, however, was *not* the person who witnessed Solazzo's signature or collected a dollar from him. Ms. Woods apparently pre-signed the membership card, which was subsequently given to Pat Lichy. It was Ms. Lichy who actually solicited Mr. Solazzo's support and, it appears, collected the required dollar payment from him some days later. Ms. Lichy returned the card to Ms. Woods with a dollar of her own. Ms. Woods, in turn, gave the card to Betty Henry, so that it could be included with the other cards supporting the union's certification application. There is no evidence of any inquiry by Ms. Woods of Ms. Lichy concerning the manner in which Solazzo's card was solicited, nor is there evidence of any inquiry by Ms. Henry with respect to this matter. None of the witnesses could recall such inquiries being made.

4. Betty Henry was called to give evidence concerning the extent of her inquiries

prior to signing the Form 8 Declaration. It should be noted, moreover, that Ms. Henry was "collector" for only seven of the cards tendered in evidence. There were other collectors for the other cards, and consequently in order to fulfill the requirements of paragraph 3 of Form 8 it would have been necessary for Ms. Henry either to have been present when the other cards were signed, or to have made the inquiries concerning the circumstances in which they were signed. The evidence before the Board disclosed neither.

5. Ms. Henry testified that she had no recollection of making inquiries concerning the Solazzo card, nor was it her practice to make such inquiries in every case prior to signing the Form 8 Declaration. She indicated that she made efforts to train employees, and impressed upon them the necessity of soliciting membership evidence properly; but, having done so, she relied on this training rather than on her own inquiries when she signed the Form 8 verifying that the membership evidence was proper. As the case of the Solazzo card indicates, this was not necessarily the case, and this irregularity might well have been revealed had Ms. Henry undertaken the inquiry contemplated by paragraph 3 of the Form 8 declaration.

6. The knowledge which is required as a precondition to signing the Form 8 Declaration was outlined by the Board in *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13:

"It is readily apparent that a person completing Form 9 must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from inquiries made of the persons who actually acted as collectors, or the persons who made the necessary inquiries of the actual collectors.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that *inquiries be made*.

In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper completion of Form 9. (See *Dominion Stores Limited* case, [1964] OLRB Rep. Dec. 447).

In the instant case, Mr. Storey, prior to completing Form 9 made inquiries of Mr. Cooke. However, Mr. Cooke had made no inquiries of Mr. Griffin and in turn Mr. Griffin had made no inquiries of other persons who had acted as collectors. It is readily apparent that the inquiries made by Mr. Storey were made of a person who had no direct knowledge of the collectors and the failure of Mr. Cooke and Mr. Griffin to make inquiries frustrated the purpose of Mr. Storey's inquiries. Where the officers of an applicant trade union have themselves frustrated the inquiries made by the person who completes Form 9 and by their failure to follow through with their own inquiries, render the inquiries made by such persons meaningless, we must find that Form 9 in such circumstances cannot serve the purpose for which it was intended and in such circumstances is a nullity. In arriving at this conclusion, the Board has noted with approval the *Valley Transportation Company Limited* case, [1963] OLRB Rep. Nov. 448, wherein the Board said at p. 452:

"The Board must expect and insist that persons who file applications for membership cards and receipts and Form 9 as evidence of membership, take all necessary precautions and care to ensure that the information contained therein is true and accurate. The Board is entitled to demand the highest standards of integrity,



disclosure, and accuracy on the part of those who submit such evidence and where undisclosed inaccuracies of material facts are later brought to its attention, to take a strict view of them.”

[emphasis added]

7. The standard enunciated by the Board in *National Steel Car, supra*, has been consistently applied in other cases in which the same issue arose. It is a standard which is well known in the labour relations community, and the cases on point are legion (see for example: *Puretex Limited*, [1972] OLRB Rep. June 676 and cases cited therein; *Stanley Steel Company Limited*, [1972] OLRB Rep. Feb. 181; and *N. D. Supermarket Limited*, [1976] OLRB Rep. March 112; *Triad Triumph Limited*, [1976] OLRB Rep. March 115; *Country Village*, [1976] OLRB Rep. July 373; *The Alexandra Hotel Limited*, [1972] OLRB Rep. Nov. 963; and more recently *Trent Valley Lodge Limited*, [1980] OLRB Rep. June 926). The purpose of the Form 8 inquiry (and the “second check” that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence - written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see section 100 of the Act). On the basis of that evidence, a trade union may be certified as the employees’ bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board’s attention, the Board will normally place total reliance on the Form 8 Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the Form 8 problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the Form 8 Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the Form 8 must be meticulous and comply strictly with its requirements.

8. Ms. Henry’s evidence amounts to this: that she has no specific recollection of making any inquiry concerning a card which is clearly irregular, and that it was her practice to rely on proper training of employee collectors rather than, in each case, making specific inquiries of them, after the fact, concerning the manner in which their cards were collected. In other words, the evidence indicates that the required inquiries were *not* made, and accordingly the Form 8 Declaration can only support those membership documents which Ms. Henry solicited herself. This conclusion is not intended to impugn Ms. Henry’s integrity, or suggest that she has intentionally sought to mislead the Board. We believe that she merely misconstrued the nature and extent of the inquiry required of her. The Board must find in the circumstances of this case, however, that the membership evidence solicited by persons other than Ms. Henry herself is not supported by the Form 8, does not meet the strict standard required by the Board, and consequently, should not be considered.

• • •

11. The application is dismissed.

12. We find the present applicant to be in a similar position. While this approach by the Board may appear to be somewhat “technical” - and in fact, we acknowledge that it *is* - there is a process at stake here which is very much in the interest of trade unions generally. And with that process must come acceptance and recognition of the normal safeguards. The present application is accordingly dismissed.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1986

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**3428-84-R:** United Steelworkers of America, (Applicant) v. K & U Manufacturing Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Brampton, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (16 employees in unit).

**0750-85-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Corporation of the Town of Dunnville, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit #1: "all employees of the respondent at Dunnville regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office staff, and employees in bargaining units for which any trade union held bargaining rights as of June 26, 1985." (45 employees in unit).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**0760-85-R:** Brewery, Malt and Soft Drink Workers, Local 304, (Applicant) v. Kwik Lok Ltd., (Respondent) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Intervener).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, and those above the rank of foreman, sales, office and clerical staff and students employed during the school vacation period." (24 employees in unit). (*Having regards to the agreement of the parties*).

**1070-85-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. 334487 Ontario Limited, carrying on business as St. Williams Nursing Home, (Respondent).

Unit: "all registered nurses employed in a nursing capacity by the respondent at St. Williams, Ontario, save and except director of nursing, persons above the rank of director of nursing, and office and clerical staff". (4 employees in unit).

**1275-85-R:** International Brotherhood of Electrical Workers Local 586, (Applicant) v. 476648 Ontario Inc., trading as R.J. Electric, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**1372-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 301, (Respondent) v. Employee, (Objector).

Unit: "all employees of the respondent working at 10 Parkway Forest Drive in the City of North York in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager and persons above the rank of property manager." (2 employees in unit). (*Having regard to the agreement of the parties*).

**1488-85-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Carlton Inn (Toronto) Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except manager, persons above the rank of manager, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and those employee in bargaining units for which any trade union held bargaining rights as of September 30, 1985." (39 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

**1636-85-R:** Labourers' International Union of North America, Local 1081, (Applicant) v. Rowad Pipeline Company Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**1891-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent).

Unit: "all employees of the respondent engaged in surveying in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

**1904-85-R:** London and District Service Workers' Union, Local 220, S.E.I.U., A.f.L., C.I.O., C.L.C., (Applicant) v. Conference Cup Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in London, Ontario, save and except assistant plant managers, persons above the rank of assistant plant manager, office, clerical and sales staff." (36 employees in unit). (*Having regard to the agreement of the parties*).

**2028-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. G.B.F. Forging Specialists Company, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Brantford, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (36 employees in unit).

**2060-85-R:** United Food and Commercial Workers International Union, (Applicant) v. Dollo Bros. Food Market Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Township of Anson, Hindon and Minden, save and except store manager, persons above the rank of store manager, produce manager, bookkeeper, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (18 employees in unit).

**2113-85-R:** The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. L. Pupolin Plumbing & Heating, (Respondent).

Unit: “all plumber, plumbers’ apprentices, steamfitters, steamfitters’ apprentices and pipe welders in the employ of the respondent in the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton and Alnwick in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2150-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Beaver Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent employed in its cafeterias at Fanshawe College, 1460 Oxford Street East, 520 First Street, London, save and except chef managers and supervisors, persons above the rank of chef managers and supervisors, office and clerical staff, persons employed for not more than twenty-four (24) hours per week and students employed for the school vacation period.” (32 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent regularly employed in its cafeterias at Fanshawe College, 1460 Oxford Street East, 520 First Street, London for not more than twenty-four (24) hours per week and students employed by the respondent in its cafeterias at Fanshawe College, 1460 Oxford Street East, 520 First Street, London, during the school vacation period, save and except chef managers and supervisors, persons above the rank of chef managers above the rank of chef managers and supervisors, office and clerical staff. (32 employees in unit). (*Having regard to the agreement of the parties*).

**2153-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Alex MacIntyre and Associates Limited, (Respondent).

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those employees primarily engaged in the repairing and maintaining of same and all construction labourers and truck drivers in the employ of the respondent in the District of Thunder Bay in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen and persons above the rank of non-working foreman.” (38 employees in unit). (*Having regard to the agreement of the parties*).

**2162-85-R:** International Ladies’ Garment Workers’ Union, (Applicant) v. Singer Lighting Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (54 employees in unit). (*Having regard to the agreement of the parties*).



**2178-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Lanor Crane Rentals Inc. (Respondent).

Unit: "all employees of the respondent working at and out of the respondent's shop in St. Catharines, save and except foremen, persons above the rank of foreman, office and clerical staff, salesmen, dispatcher, and persons for whom any trade union held bargaining rights as of November 27, 1985." (2 employees in unit). (*Having regard to the agreement of the parties*).

**2191-85-R:** Ontario Public Service Employees Union, (Applicant) v. Dawn Patrol Group Homes Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Hamilton, save and except the secretary/bookkeeper, supervisors and those above the rank of supervisor." (25 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2192-85-R:** Ontario Public Service Employees Union, (Applicant) v. Dufferin Area Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all paramedical employees of the respondent at Orangeville, Ontario, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week." (30 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all paramedical employees of the respondent at Orangeville, Ontario regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of November 28, 1985, being the date of application." (30 employees in unit). (*Having regards to the agreement of the parties*). (*Clarity Note*).

**2195-85-R:** United Steelworkers of America, (Applicant) v. G.K.L. Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period." (40 employees in unit). (*Having regard to the agreement of the parties*).

**2201-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Applicant) v. St. Mary's Cement Company, (Respondent) v. Cement, Lime, Gypsum and Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers AFL-CIO-CLC Union Local 568, (Intervener).

Unit: "all employees of the respondent at its plant at Bowmanville, save and except foremen, persons above the rank of foreman, office, sales and salaried technical staff." (86 employees in unit). (*Having regard to the agreement of the parties*).

**2202-85-R:** Ontario Public Service Employees Union, (Applicant) v. North Waterloo Society for Crippled Children, (Respondent).

Unit: "all employees of the respondent in Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff, maintenance staff, support staff, and teachers employed in the capacity of a certified teacher." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2203-85-R:** The Canadian Union of Public Employees (Applicant) v. Essex County Board of Education, (Respondent).

Unit: “all employees employed by the respondent as teacher aides in the County of Essex, save and except supervisors, persons above the rank of supervisor and employees for which any trade union held bargaining rights as of November 28, 1985.” (11 employees in unit). (*Having regard to the agreement of the parties*).

**2205-85-R:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (Applicant) v. 601210 Ontario Inc., (Respondent).

Unit #1: “all employees of the respondent in the City of Hamilton, save and except office staff, chefs, assistant chefs, hostesses, assistant hostesses, persons above the rank of assistant hostess and assistant chef, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (79 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in the City of Hamilton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except office staff, chefs, assistant chefs, hostesses and assistant hostesses and persons above the rank of assistant hostess and assistant chef. (79 employees in unit). (*Having regard to the agreement of the parties*).

**2209-85-R:** The Canadian Brotherhood of Railway Transport and General Workers, (Applicant) v. Trav-  
elways School Transit Ltd., Metro Division, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at its Metro Division, 4150 Finch Avenue East, Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, dispatch-  
ers, employees in the bargaining units for which any trade union held bargaining rights as of December 2, 1985, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2225-85-R:** Ontario Public Service Employees Union, (Applicant) v. The Oxford County Board of Edu-  
cation, (Respondent).

Unit #1: “all office and clerical employees of the respondent in the County of Oxford, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the superintendent of busi-  
ness, secretary to the director of education, affirmative action co-ordinator, persons employed pursuant to a government grant program, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and persons for whom any trade union held bargaining rights as at December 3, 1985.” (87 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all office and clerical employees of the respondent in the County of Oxford, Ontario, reg-  
ularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the superintendent of business, secretary to the director of education, affirmative action co-ordinator, persons employed pursuant to a government grant program and persons for whom any trade union held bargaining rights as at December 3, 1985.” (87 employees in unit). (*Having regard to the agreement of the parties*).

**2251-85-R:** Ontario Nurses’ Association, (Applicant) v. Beverly Enterprises Canada Limited, (Respondent).

Unit: “all registered and graduate nurses employed by the respondent in a nursing capacity at 95 Hum-  
ber College Blvd. in Metropolitan Toronto, save and except Director of Care and persons above the rank of Director of Care.” (13 employees in unit). (*Having regard to the agreement of the parties*).

**2252-85-R:** Ontario Nurses’ Association, (Applicant) v. Corp. of the County of Bruce, Brucelea Haven, Home for the Aged, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Walkerton, save and except Director of Nursing and persons above the rank of Director of Nursing." (13 employees in unit). (*Having regard to the agreement of the parties*).

**2254-85-R:** Local 2228, International Brotherhood of Electrical Workers, (Applicant) v. ADGA Systems International Limited, (Respondent).

Unit: "all employees of the respondent at the Canada Department of Communications, Communications Research Centre, Building 46, Shirley's Bay, save and except the team leader." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2283-85-R:** Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Carefree Lodge, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by subsisting collective agreements." (11 employees in unit). (*Having regard to the agreement of the parties*).

**2293-85-R:** The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Finstar Construction Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2299-85-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. 572379 Ontario Limited c.o.b. as The Ascot Inn, (Respondent) v. Local 280 of the International Beverage Dispensers & Bartenders Union of the Hotel & Restaurant Employees and Bartenders International Union, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, front desk staff, persons regularly employed for not more than (24) twenty-four hours per week, students employed during the school vacation period and persons covered by a collective agreement expiring April 30, 1987 between Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel and Restaurant Employees and Bartenders Union and the respondent." (27 employees in unit). (*Having regard to the agreement of the parties*).

**2304-85-R:** United Steelworkers of America, (Applicant) v. Cambridge Stampings Inc., (Respondent).

Unit: "all employees of the respondent in the city of Cambridge, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (62 employees in unit). (*Having regard to the agreement of the parties*).



**2318-85-R:** United Food & Commercial Workers, Local 206, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Viletta China Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (40 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Mississauga, Ontario, employed for not more than twenty-four (24) hours per week and students employed for the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2336-85-R:** United Food and Commercial Workers International Union AFL-CIO-CLC, (Applicant) v. Siena Foods Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period.” (51 employees in unit). (*Having regard to the agreement of the parties*).

**2338-85-R:** United Steelworkers of America, (Applicant) v. Liquid Carbonic Inc., and Goodmil Services Limited, carrying on business as Transpersonnel, (Respondents).

Unit: “all employees of Goodmil Services Limited, carrying on business as Transpersonnel, in and out of the Township of Sombra, save and except dispatcher, supervisors, and persons above the rank of supervisor, office and sales staff.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2343-85-R:** Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Simcoe, (Respondent) v. Brewery, Malt and Soft Drink Workers, Local Union 304, (Intervener #1) v. Robert Booth, Trustee of Canadian Union of United Brewery, Flour, Cereal, Soft Drink and distillery Workers, Local Union 304, (Intervener #2).

Unit: “all office, clerical and technical employees of the respondent in Simcoe County, save and except deputy department heads, persons above the rank of deputy department head, secretary to the chief administrative officer, recording secretary/assistant, secretary to the chief administrative officer, secretary to the engineer, assistant chief librarian, office manager - roads department, maintenance supervisors, persons employed in homes for the aged, students employed during the school vacation period, and employees in bargaining units for which any trade union held bargaining rights as of December 17, 1985, being the date of application. (39 employees in unit). (*Having regard to the agreement of the parties*).

**2350-85-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Passas Restaurants Limited, (Respondent).

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, head chef, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week.” (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, head chef, office and sales staff.” (34 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2356-85-R:** Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, (Applicant) v. Lamilite Limited Limitee, (Respondent).

Unit: "all employees of the respondent in Orangeville, Ontario, save and except forepersons, those above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (48 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2368-85-R:** International Brotherhood of Electrical Workers Local Union 773, (Applicant) v. Wackenhut of Canada Limited, (Respondent).

Unit: "all employees of the respondent at its Alarm Division in Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical, and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

**2379-85-R:** United Food and Commercial Workers, Local 206, Chartered by United Food & Commercial Workers International Union, C.L.C., A.F.L. - C.I.O., (Applicant) v. Royal Canadian Legion, Branch No. 80, (Respondent).

Unit: "all employees of the respondent in Midland, save and except managers, persons above the rank of manager, and persons regularly employed for not more than twenty-four hours per week." (4 employees in unit). (*Having regard to the agreement of the parties*).

**2381-85-R:** Canadian Union of Public Employees, (Applicant) v. Cochrane-Iroquois Falls District Roman Catholic Separate School Board, (Respondent).

Unit: "all office, clerical and technical employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, in Cochrane-Iroquois Falls, save and except Superintendent of Business, persons above the rank of Superintendent of Business, Accountant, Administrative Assistant to the Director of Education and employees in bargaining units for which any trade union held bargaining rights as of December 31, 1985." (10 employees in unit). (*Having regard to the agreement of the parties*).

**2401-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Bidwell Investments Limited, c.o.b. as President Motor Hotel, (Respondent).

Unit: "all employees of the respondent in Sudbury regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except persons for whom any trade union held bargaining rights as of December 24, 1985." (23 employees in unit).

**2411-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. 629434 Ontario Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Dublin, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff." (62 employees in unit). (*Having regard to the agreement of the parties*).

**2412-85-R:** International Brotherhood of Painters and Allied Trades Local Union 1904, (Applicant) v. 612327 Ontario Limited carrying on business as Ault & Associates, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of foreman." (6 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in that portion of the District of Algoma South of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

**2419-85-R:** The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Ajax, (Respondent).

Unit: “all office, clerical and technical employees of the respondent in the Town of Ajax, save and except managers, superintendents, persons above the rank of superintendent and manager, executive secretaries, accountant, payroll co-ordinator, secretary to the Deputy Recreation Director, employees in bargaining units for which any trade union held bargaining rights as of January 2nd, 1986, and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (53 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2437-85-R:** United Food and Commercial Workers International Union, Local 175, AFL-CIO-CLC, (Applicant) v. Thorold I.G.A. Market, (Respondent).

Unit: “all employees of the respondent in Thorold regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except department managers, persons above the rank of department manager, and employees for whom any trade union held bargaining rights as of January 6th, 1986.” (53 employees in unit). (*Having regard to the agreement of the parties*).

**2466-85-R:** United Brotherhood of Carpenters’ & Joiners of America, Local Union 27, (Applicant) v. Carswell & Norton Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**1989-85-R:** International Union of Operating Engineers, Local 796, (Applicant) v. Kemptville District Hospital, (Respondent).

Unit: “all employees of the respondent at its Hospital regularly employed for not more than 24 hours per week save and except office staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors (department heads), persons above the rank of supervisors, plant superintendent, and persons in bargaining units for which any trade union held bargaining rights on November 6, 1985.” (24 employees in unit). (*Having regard to the agreement of the parties*).

Number of Names of persons on list as originally prepared by employer	24
Number of names of persons on revised voters’ list	13
Number of persons who cast ballots	13



Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	3

**2092-85-R:** International Union of Operating Engineers Local 796, (Applicant) v. York-Finch General Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 101, (Intervener).

Unit: "all stationary engineers employed in the boiler room of the respondent and persons primarily engaged as their helpers, save and except the chief engineers." (4 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0

**2219-85-R:** United Steelworkers of America, (Applicant) v. Whitby Steel Inc., (Respondent) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Intervener).

Unit: "all employees of the respondent in its plant in the Town of Whitby, save and except foreman, persons above the rank of foreman, office, clerical and sales staff, draftsmen, watchmen, guards, persons engaged in extensions or remodelling of the respondent's premises, persons engaged in field erection installation or construction work, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	46
Number of segregated ballots cast by persons whose name appear on voters' list	1
Number of segregated ballots cast by persons whose names do no appear on voters' list	2
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	17
Ballots segregated and not counted	1

## Bargaining Agents Certified Subsequent to a Post-Hearing Vote

**1952-85-R; 1953-85-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Red Oak Inn (Peterborough, Ontario) (Canadian Pacific Hotels, a Division of Canadian Pacific Airlines Limited), (Respondent) v. Hotel Employees and Restaurant Employees Union, Local 604, (Intervener).

Unit: "all employees of the respondent in positions listed below and employees who are assigned to positions similar in kind or class to those listed below, save and except Supervisors, persons above the rank of Supervisor, Security Guards, Front Desk Clerks, Front Desk Cashiers, Office Staff, Students employed during the school vacation period, and Banquet Personnel;

Group 1: Lifeguards; Housemaids; Houseman; Laundry Attendants; Maintenance Helper.

Group 2: Cook's Helper; Pantry Helper; Short Order Cook; 2nd Cook; 1st Cook; Head Pantry Worker; Roast Cook; Gardemanger; Prep Cook; Kitchen Helper; Cleaner; Night Kitchen Cleaner; Apprentice Cook Year 1; Apprentice Cook Year 2; Apprentice Cook Year 3.

Group 3: Waitress/Waiter; Bus Boys; Bar Porter; Cashiers; Bartenders. (56 employees in unit).

Number of names of persons on list as originally prepared by employer	70
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Number of persons who cast ballots	49	
Number of ballots marked in favour of applicant		48
Number of ballots marked in favour of intervener		1

**1985-85-R:** Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Petrolia, (Respondent).

Unit: "all employees of the respondent in Petrolia regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foreman of the works department, foreman parks and recreation department, foreman of the arena, concession manager of the arena, recreation department program supervisor, persons above the rank of foreman, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of November 4, 1985." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		2
Ballots segregated and not counted		3

**2176-85-R:** Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Cavalier Beverages Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at North Bay, Ontario, save and except supervisors, those above the rank of supervisor, clerical and office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		5

**2476-85-R:** Ontario Public Service Employees Union, (Applicant) v. The Riverdale Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers Local 101, (Intervener #1) v. Canadian Union of Public Employees, (Intervener #2).

Unit: "all paramedical employees of the Respondent in Metropolitan Toronto, save and except Supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students on field placement from school, College or University, and employees for which any trade union held bargaining rights as of January 9, 1986." (25 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of Names of persons on revised voters' list		18
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		4

## Applications for Certification Dismissed - No Vote Conducted

**0750-85-R:** United Food and Commercial Workers International Union, Local 175, (Applicant) v. Corporation of the Town of Dunnville, (Respondent) v. The Canadian Union of Public Employees, (Intervener). (45 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

**1439-85-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Quick Messenger Service, a Division of 382525 Ontario Limited, (Respondent). (63 employees in unit).

**1514-85-R:** United Electrical, Radio and Machine Workers of Canada (UE), (Applicant) v. Mecro Group Ind., Labelmasters and Papermasters Divisions, (Respondent) v. Group of Employees, (Objectors). (35 employees in unit).

### Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2219-85-R:** United Steelworkers of America, (Applicant) v. Whitby Steel Inc., (Respondent) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Intervener).

Unit: "all employees of the respondent in its plant in the Town of Whitby, save and except foreman, persons above the rank of foreman, office, clerical and sales staff, draftsmen, watchmen, guards, persons engaged in extensions or remodelling of the respondent's premises, persons engaged in field erection installation or construction work, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	46
Number of segregated ballots cast by persons whose name appear on voters' list	1
Number of segregated ballots cast by persons whose names do no appear on voters' list	2
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	17
Ballots segregated and not counted	1

**2231-85-R:** Canadian Paperworkers Union, (Applicant) v. MacMillan Bathurst Inc., (Respondent) v. The International Wood Workers of America, (Intervener). (110 employees in unit).

Unit: "all employees of its plant at 1155 Talbot St., St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office sales staff, art department staff, design department staff, technical and development department staff, industrial engineering department staff, production schedulers, quality control department staff, waste co-ordinators and watchmen." (employees in unit).

Number of names of persons on revised voters' list	138
Number of persons who cast ballots	128
Number of ballots marked in favour of applicant	53
Number of ballots marked in favour of intervener	75

### Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

**1657-84-R:** United Electrical, Radio and Machine Workers of Canada, (UE), (Applicant) v. GTE Sylvania Canada Limited, Sylvania Lighting Services Division, (Respondent) v. Group of Employees, (Objectors).



Unit: "all employees of the respondent in Metropolitan Toronto, the City of Cambridge, the city of Kingston, the City of Hamilton, the City of London and the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office, sales and engineering staff." (14 employees in unit).

Number of names of persons on revised voters' list		36
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		14
Ballots segregated and not counted		3

**0461-85-R:** United Food & Commercial Workers Union, Local 409, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent employed at its warehouse in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods and students employed on a co-operative program with a school, college or university." (12 employees in unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	3	

Unit #2: "all employees of the respondent at its warehouse in the City of Thunder Bay regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation periods and students employed on a co-operative program with a school, college or university." (4 employees in unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	

**0861-85-R:** United Steelworkers of America, (Applicant) v. Albert Larocque Lumber Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent located in the Township of West Hawkesbury, save and except foremen and persons above the rank of foreman, office, clerical, and sales staff, and students employed during the summer vacation period." (51 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		53
Number of names of persons on revised voters' list		48
Number of persons who cast ballots	48	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		34

**1488-85-R:** Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. The Carlton Inn (Toronto) Inc., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except managers, persons above the rank of manager, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of September 30, 1985." (39 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	2	

Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

**1750-85-R:** United Steelworkers of America, (Applicant) v. Burnstein Castings Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the Respondent in St. Catharines, Ontario, save and except managers, persons above the rank of manager, persons employed for not more than 24 hours per week and employees in bargaining units for which any trade union held bargaining rights as of October 15, 1985, being the date of application." (23 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list originally prepared by employer	12
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	8

**2047-85-R:** United Steelworkers of America, (Applicant) v. Bapco (A Partnership of CIL Inc. and The Sherwin-Williams Company), (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Vaughan, save and except supervisors and coordinators, persons above the rank of supervisor and coordinator, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (105 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	100
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	64
Ballots segregated and not counted	1

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**3419-84-R:** United Steelworkers of America, (Applicant) v. Teknion Furniture Systems Inc., (Respondent).

**0161-85-R:** International Beverage Dispensers and Bartenders Union, Local 280 of The Hotel Employer, Restaurant Employees International Union, (Applicant) v. 366741 Ontario Ltd. c.o.b. as Crispins Restaurant and Buddy's, (Respondent) v. Group of Employees, (Objectors).

**1886-85-R:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (Applicant) v. O'Tooles Roadhouse Restaurant, (Respondent).

**2011-85-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. City Express, (Respondent).

**2148-85-R:** United Food & Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Greek Community Metropolitan Toronto Inc., (Respondent).

**2256-85-R:** Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hammerson Mascan Canada Inc., (Respondent).

**2315-85-R:** Ontario English Catholic Teachers' Association Secretariat Association, (Applicant) v. Ontario English Catholic Teachers' Association, (Respondent).

**2333-85-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Alltour Marketing Support Services Limited, (Respondent).

**2453-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Ardwell Developments Inc. and/or Greenwin Property Management and/or Foris Investments Limited and Rating Investments Limited carrying on business as Parkview Management for Annabelle Tower, (Respondent).

**2546-85-R:** International Brotherhood of Electrical Workers, Local Union 105, (Applicant) v. Morell Electric Ltd., (Respondent).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2991-84-R:** Graphic Communications International Union, Local 517, (Applicant) v. McCollum Graphics Incorporated, o/a Baxter Press, Hunter Printing London Limited and Baxter Graphix Inc., (Respondents). (*Granted*).

**1964-85-R:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Rogers Drywall and Plastering Ltd., and Stable Investments Ltd., (Respondents). (*Withdrawn*).

**2187-85-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. Astro Concrete & Servicing (London) Limited and Fortese Concrete Ltd., (Respondents). (*Withdrawn*).

**2339-85-R:** United Steelworkers of America, (Applicant) v. Liquid Carbonic Inc., and Goodmil Services Limited, carrying on business as Transpersonnel, (Respondents). (*Withdrawn*).

## SALE OF A BUSINESS

**0603-85-R:** United Food & Commercial Workers, Local 206, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Super Tops Holdings Inc., (Respondent). (*Dismissed*).

**1986-85-R:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 572062 Ontario Inc. c.o.b. as Triple Four Interior Systems and Drycoustic Construction Limited, (Respondents). (*Withdrawn*).

**2187-85-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. Astro Concrete & Servicing (London) Limited and Fortese Concrete Ltd., (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1257-85-R:** B. Harrison, (Applicant) v. Ontario Public Service Employees, (Respondent) v. Children's Aid Society of the Regional Municipality of Waterloo, (Intervener).

Unit: "all office and clerical employees of The Children's Aid Society of the Regional Municipality of Waterloo in the Regional Municipality of Waterloo, save and except executive secretary, controller,



supervisors, manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in unit). (*Dismissed*).

Number of names of persons on list as originally prepared by employer	16
Number of persons who cast ballots	16
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	8

**1513-85-R:** Richard J. Dwyer, (Applicant) v. International Association of Machinists and Aerospace Workers District Lodge 717, (Respondent) v. Caravan Trailer Rental Company Ltd., (Intervener). (30 employees in unit). (*Dismissed*).

Unit: “all employees of the company employed in the Town of Halton Hill, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period.”

Number of names of persons on revised voters’ list	36
Number of persons who cast ballots	29
Number of ballots marked in favour of respondent	15
Number of ballots marked against respondent	14

**1672-85-R:** Allan Berdan et al, (Applicants) v. Canadian Brotherhood Railway, Transport and General Workers, (Respondent) v. Bill Thompson Transport Limited, (Intervener). (10 employees in unit). (*Dismissed*).

**1950-85-R:** Union Employees of Alder Place Hotel, (Applicant) v. Hotel Employees and Restaurant Employees International Union, Local 75, (Respondent) v. Alder Place Hotel, (Intervener). (26 employees in unit). (*Granted*).

**2036-85-R:** A Group of Employees of Ontario Legal Aid Plan, York County, (Applicants) v. Ontario Public Service Employees Union, (Respondent) v. York County Office of the Ontario Legal Aid Plan under the Administration of the Law Society of Upper Canada, (Intervener).

Unit: “all the employees of the Law Society of Upper Canada, Administrator of the Ontario Legal Aid Plant at its York County Office in the Municipality of Metropolitan Toronto, save and except Criminal Entitlement Officer, Assistant Entitlement Officer, Administration Supervisor, persons above the rank of Criminal Entitlement Officer, Assistant Entitlement Officer, Administration Supervisor, members of the legal profession employed in a professional capacity, secretaries to the Area Director and the Administrator/Personal Manager, Filing Supervisor, Civil Unit Secretarial Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (52 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	51
Number of persons who cast ballots	48
Number of ballots marked in favour of respondent	14
Number of ballots marked in favour of intervener	34

**2267-85-R; 2268-85-R:** Standard Commercial Tobacco Company of Canada Ltd., (Applicant) v. Canadian Union of Operating Engineers, and General Workers, Local 100, (Respondent). (3 employees in unit). (*Granted*).

**2311-85-R:** Minnie Deitz, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 3054, (Respondent). (3 employees in unit). (*Granted*).

**2334-85-R:** Nelson Pereira, (Applicant) v. United Steelworkers of America, (Respondent). (8 employees in unit). (*Withdrawn*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**2410-83-U:** United Food and Commercial Workers International Union, (Complainant) v. Foodcorp Limited, (Respondent #1) v. Swiss Chalet Employers' Association on behalf of its member Viriato Foods Inc., (Respondent #2) v. Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union AFL-CIO-CLC, Local 88, (Intervener). (*Dismissed*).

**2824-83-U:** George Barr and Others, (Complainants) v. United Plant Guard Workers of America and the Amalgamated Plant Guards Local 1958, (Respondents). (*Dismissed*).

**0961-84-U:** International Union of Operating Engineers, Local 793, (Complainant) v. Land Grading and Excavating Company, (Respondent). (*Withdrawn*).

**2653-84-U:** Barbara Veraldi, (Complainant) v. United Food and Commercial Workers International Union, (Respondent) v. The Great Atlantic and Pacific Co. of Canada Ltd., (Intervener). (*Dismissed*).

**3273-84-U:** Communications, Electronic, Electrical Technical and salaried Workers of Canada, (Complainant) v. Super Plastics Corporation Limited, (Respondent). (*Granted*).

**3315-84-U:** James Richard Hughes, (Complainant) v. Amalgamated Transit Union Local #113, (Respondent) v. Toronto Transit Commission, (Intervener). (*Dismissed*).

**3420-84-U:** United Steelworkers of America, (Complainant) v. Teknion Furniture Systems Inc., Saul Feldberg, David Feldberg, Monty Brown, Ken Walker, Joe Ameida, Alex Ribeiro, Duc Tran, (Respondents). (*Dismissed*).

**3429-84-U:** United Steelworkers of America, (Complainant) v. K & U Manufacturing Limited, (Respondent). (*Granted*).

**2053-85-U:** Dale R. Carmount, (Complainant) v. United Steel Workers of America Local 5390 Cummins Ontario Limited, (Respondent). (*Dismissed*).

**0162-85-U:** International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. 366741 Ontario Ltd. c.o.b. as Crispins Restaurant and Buddy's, (Respondent). (*Withdrawn*).

**0181-85-U:** Anthony Gene Woodhouse, (Complainant) v. International Brotherhood of Bridge, Structural & Ornamental Ironworkers Local Union 736, (Respondent). (*Dismissed*).

**0271-85-U:** Nestor Duque, (Complainant) v. Local 707 United Auto Workers Union, (Respondent) v. Ford Motor Company of Canada, Limited, (Intervener). (*Dismissed*).

**0882-85-U:** Jean Mearns, Teresa Rudzki, Randy LeBlanc, Edith Mil-Homens, Sandra Keddy , M. O'Callaghan, (Complainants) v. Walter Oliverira, (Respondent). (*Withdrawn*).

**0953-85-U:** United Electrical, Radio and Machine Workers of Canada (UE), (Complainant) v. GTE Sylvania Canada Limited, Sylvania Lighting Services Division, (Respondent). (*Withdrawn*).

**0982-85-U:** Graphic Communications International Union, Local 466, (Complainant) v. Prestocrest Canada Limited, (Respondent). (*Withdrawn*).

**1081-85-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Leader Linen Supply, (Respondent). (*Withdrawn*).

**1327-85-U:** Ontario Public Service Employees Union, (Complainant) v. Community Legal Education Ontario, The Ontario Legal Aid Plan and Ross Irwin, (Respondents). (*Withdrawn*).

**1328-85-U:** Canadian Paperworkers Union, Local 304, (Complainant) v. Sunworthy Wallcoverings a Division of Borden Company Limited, (Respondent). (*Dismissed*).

**1369-85-U:** Retail, Wholesale and Department Store Union, (Complainant) v. Grand & Toy Limited, (Respondent). (*Withdrawn*).

**1391-85-U:** Raymond C. Kennedy, (Complainant) v. Local Union 232, United Rubber, Cork, Linoleum and Plastic Workers of America and Goodyear Canada Inc. New Toronto Factory, (Respondent). (*Dismissed*).

**1592-85-U:** Kim Erb, (Complainant) v. Local 786 Ironworks & Gord Verdeceo, (Respondents). (*Withdrawn*).

**1703-85-U:** St. Peter's Hospital, (Complainant) v. C.U.P.E., Local 778, Peter Douglas, Susan Brooks, Dawn Russell, Lois Hill, Nina Tichoniuk, Mary Elliott, (Respondents). (*Withdrawn*).

**1737-85-U:** Bonnie Graham, Dan McQuade, Martin Smyth and Daniel Ford, (Complainants), v. Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Respondent) v. The Globe & Mail division of the Canadian Newspapers Limited, (Intervener). (*Withdrawn*).

**1792-85-U:** Ken Johnson, (Complainant) v. Ontario Secondary School Teachers' Federation, (Respondent). (*Dismissed*).

**1840-85-U:** Retail, Wholesale and Department Store Union, Local 414, (Complainant) v. Speedy Messenger Service, (Respondent). (*Withdrawn*).

**1866-85-U:** United Food & Commercial Workers International Union AFL, CIO, CLC, (Complainant) v. Jacmorr Manufacturing Limited, (Respondent). (*Withdrawn*).

**1883-85-U:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. 129682 Canada Ltd. c.o.b. as TCB Farmshop, (Respondent). (*Withdrawn*).

**1911-85-U:** Venancio T. Bautista, Lucy Gatchalian, Ludmila Hoediono and Maria Racic, (Complainants) v. Xerox Canada and Amalgamated Clothing & Textile Workers Union, (Respondents). (*Withdrawn*).

**1914-85-U:** United Food and Commercial Workers International Union, Local 486, (Complainant) v. Riverview Nursing Home (1984) Ltd. and Leonard Parsons, (Respondent). (*Withdrawn*).

**1943-85-U:** Ruby Brown, (Complainant) v. Royal York Hotel C.P., (Respondent). (*Withdrawn*).

**2021-85-U:** Local Union 586 of the International Brotherhood of Electrical Workers, (Complainant) v. R. J. Electric, (Respondent). (*Withdrawn*).

**2023-85-U:** Robert W. Smart, Candice Moore, Colin Campbell, and Canadian Paperworkers' Union, (Complainants) v. Carlton Cards Ltd., (Respondent). (*Withdrawn*).

**2027-85-U:** The Southern Ontario Newspaper Guild Local 87, Newspaper Guild, (Complainant) v. Harlequin Enterprises Ltd., (Respondent). (*Withdrawn*).



**2040-85-U:** Osborne John, (Complainant) v. Service Employees Union Local 204, (Respondent) v. Toronto East General and Orthopaedic Hospital Inc., (Intervener). (*Withdrawn*).

**2054-85-U:** Mrs. Maureen Watt, (Complainant) v. Service Employees International Union Local 210, (Respondent). (*Withdrawn*).

**2069-85-U:** Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Complainant) v. Design Craft Limited and Labourers International Union of North America, Local 506, (Respondent). (*Withdrawn*).

**2083-85-U:** Ontario Nurses' Association, (Complainant) v. Metro Windsor - Essex County Board of Health and Health Unit, (Respondent). (*Withdrawn*).

**2085-85-U:** Paul Tanti, (Complainant) v. R.W.D.S.U. AFL-CIO-CLC, (Respondent). (*Withdrawn*).

**2086-85-U:** Canadian Paperworkers' Union, (Complainant) v. Carlton Cards Ltd., (Respondent). (*Withdrawn*).

**2087-85-U:** Canadian Paperworkers' Union, (Complainant) v. Rustcraft Canada Inc., (Respondent). (*Withdrawn*).

**2088-85-U:** The International Association of Machinists and Aerospace Workers, (Complainant) v. Dickson Brothers Ltd., (Respondent). (*Withdrawn*).

**2089-85-U:** Christian Labour Association of Canada, (Complainant) v. Geri-Care Nursing Homes of Canada, (Respondent). (*Withdrawn*).

**2091-85-U:** Amalgamated Clothing and Textile Workers Union, (Complainant) v. Paramount Industries - Division of Donlee Manufacturing Industries Limited, (Respondent). (*Withdrawn*).

**2112-85-U:** Mark Ardiel, (Complainant) v. United Steelworkers of America Local 6500, (Respondent). (*Withdrawn*).

**2116-85-U:** Office & Professional Employees International Union, Local 343, (Complainant) v. The Metropolitan Toronto Police Association, (Respondent). (*Withdrawn*).

**2119-85-U:** Richard D. Jones, (Complainant) v. Toronto Transit Commission; Oscar Giovannini; William Bennet; N. Tash, (Respondent). (*Withdrawn*).

**2125-85-U:** Bonnie Graham, Dan McQuade, Martin Smyth and Daniel Ford, (Complainants) v. Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Respondent). (*Withdrawn*).

**2170-85-U:** Labourers' International Union of North America, Local 183, (Complainant) v. York Condominium Corporation No. 106, (Respondent). (*Withdrawn*).

**2211-85-U:** Canadian Union of Public Employees, (Complainant) v. Hillside Nursing Home Ltd., (Respondent). (*Withdrawn*).

**2246-85-U:** Robert Alexander Stewart, (Complainant) v. United Steel Workers of America, (Respondent). (*Withdrawn*).

**2266-85-U:** Trevor Murdough, (Complainant) v. Ontario Liquor Boards Employees Union, (Respondent). (*Withdrawn*).

**2300-85-U; 2301-85-U; 2351-85-U; 2352-85-U; 2353-85-U; 2365-85-U:** Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Bentley's Seafood Restaurant, (Respondent). (*Withdrawn*).

**2320-85-U:** Joseph Vincent O'Kane, (Complainant) v. The Labourers International Union Local #597, Oshawa, Ontario, (Respondent). (*Withdrawn*).

**2332-85-U:** University of Guelph Staff Association, (Complainant) v. University of Guelph, (Respondent). (*Withdrawn*).

**2340-85-U:** United Steelworkers of America, (Complainant) v. Liquid Carbonic Inc., (Respondent). (*Withdrawn*).

**2363-85-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Complainant) v. Alltour Marketing Support Services Limited, (Respondent). (*Withdrawn*).

**2407-85-U:** Roland Boesch, (Complainant) v. International Nickel Company of Canada, (Respondent). (*Withdrawn*).

**2436-85-U:** Health, Office & Professional Employees a division of Local 206, United Food & Commercial Workers chartered by the United Food & Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Sara Vista Nursing Home, (Respondent). (*Withdrawn*).

**2518-85-U:** Emile Martel, (Complainant) v. General Motors of Canada Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**0569-85-U:** United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. C. S. Yachts Ltd., (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**2120-85-M:** Doris Kramer, (Applicant) v. Ontario Public Service Employees Union, Local 246, (Respondent Trade Union) v. Children's Aid Society of the Regional Municipality of Waterloo, (Respondent Employer). (*Granted*).

**2121-85-M:** Vera M. Baerg, (Applicant) v. Ontario Public Service Employees Union Local 246, (Respondent Trade Union) v. Children's Aid Society of the Regional Municipality of Waterloo, (Respondent Employer). (*Granted*).

## APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

**2249-85-M:** Work Wear Corporation of Canada Ltd., (Employer) v. Retail, Wholesale and Department Store Union, AFL-CIO:CLC, (Trade Union). (*Granted*).

**2302-85-M:** The Metropolitan General Hospital, (Employer) v. Local Union 636 of the International Brotherhood of Electrical Workers, (Trade Union). (*Granted*).

## **APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS**

**3297-84-M:** Canadian Union of Public Employees - CLC, Ontario Hydro Employees Union, Local 1000, (Applicant) v. Ontario Hydro, (Respondent). (*Withdrawn*).

**3501-84-M:** Ontario Nurses' Association, (Applicant) v. Campbellford Memorial Hospital, (Respondent). (*Dismissed*).

**1841-85-M:** Canadian Union of Public Employees, Local #207, (Applicant) v. Corporation of the Town of Valley East, (Respondent). (*Withdrawn*).

## **COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT**

**3274-84-OH:** Rashpal Kali Rai, (Complainant) v. Super Plastics Corporation Limited, (Respondent). (*Granted*).

**2288-85-OH:** James Patrick Cribbin, (Complainant) v. Emco Limited, (Respondent). (*Withdrawn*).

**2289-85-OH:** James Patrick Cribbin, (Complainant) v. Emco Limited, (Respondent). (*Withdrawn*).

**2382-85-OH:** Douglas Ball, (Complainant) v. Dickson Brothers Ltd., (Respondent). (*Withdrawn*).

## **COLLEGES COLLECTIVE BARGAINING ACT**

**3225-84-U:** Ontario Public Service Employees Union, (Complainant) v. Board of Governors of Fanshawe College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

**1190-85-U:** The Ontario Public Service Employees Union, (Complainant) v. Sir Sandford Fleming College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

**2002-85-U:** The Ontario Public Service Employees Union, (Complainant) v. Confederation College of Applied Arts and Technology, (Respondent). (*Withdrawn*).

## **CONSTRUCTION INDUSTRY GRIEVANCES**

**1946-84-M:** International Brotherhood of Electrical Workers, Local 120, (Applicant) v. State Contractors Inc., (Respondent). (*Granted*).

**2115-84-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ottawa G.S.B. Construction Co. Ltd., (Respondent). (*Granted*).

**0576-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Cornerstone Builders Limited, (Respondent). (*Withdrawn*).



**1232-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Andrew Paving and Engineering Limited, (Respondent). (*Withdrawn*).

**1463-85-M:** International Union of Operating Engineers Local 793, (Applicant) v. Armbro Materials & Construction Ltd., (Respondent). (*Withdrawn*).

**1509-85-M:** Construction Workers Local 53, Christian Labour Association of Canada, (Applicant) v. C.F.A. Operations Inc., (Respondent). (*Withdrawn*).

**1537-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Pachino Construction Company Limited, (Respondent). (*Withdrawn*).

**1714-85-M:** International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 736, (Applicant) v. Rollins Steel Services Ltd., (Respondent). (*Granted*).

**1802-85-M:** Labourer's International Union of North America, Local 183, (Applicant) v. Power Pac Construction Company Limited, (Respondent). (*Withdrawn*).

**1845-85-M:** Carpenters District Council of Toronto and Vicinity on behalf of the United Brotherhood of Carpenters and Joiners of America, Local 27, (Applicant) v. Gargaro & Sons Carpentry Limited, (Respondent). (*Granted*).

**1963-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Rogers Drywall and Plastering Ltd., and Stable Investments Ltd., (Respondents). (*Withdrawn*).

**2032-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. The Islander-Westland Group, (Respondent). (*Granted*).

**2058-85-M:** Laborers International Union of North America, Local 607, (Applicant) v. Rino Zanette (1981) Ltd., (Respondent). (*Granted*).

**2065-85-M:** Carpenters' District Council of Toronto and Vicinity on behalf of Local 27, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Hugo Hirtz Construction Ltd., (Respondent). (*Granted*).

**2081-85-M:** Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, (Applicant) v. Windsor Tavern, (Respondent). (*Withdrawn*).

**2140-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Denovellis and Valente Concrete and Drain, (Respondent). (*Withdrawn*).

**2146-85-M:** Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Cunningham Limp Ltd., (Respondent). (*Granted*).

**2165-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Ferno Construction Ltd., (Respondent). (*Withdrawn*).

**2188-85-M:** Labourers' International Union of North America, Local 1059, (Applicant) v. Astro Concrete & Servicing (London) Limited and Fortese Concrete Ltd., (Respondent). (*Granted*).

**2227-85-M:** International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. J. T. Young Construction and Investment Limited, (Respondent). (*Granted*).

**2260-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Highrock Structural Ltd., (Respondent). (*Withdrawn*).

**2287-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Umacs of Canada Inc., (Respondent). (*Withdrawn*).

**2317-85-M:** International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. 615117 Ontario Ltd., c.o.b. as York Thermal Services, (Respondent). (*Withdrawn*).

**2360-85-M:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Central Drywall and Acoustics Company, (Respondent). (*Granted*).

**2366-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. 572062 Ontario Inc. carrying on business as Triple Four Interior Systems Drycoustic Construction Limited, (Respondent). (*Withdrawn*).

**2375-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. H. G. Sugin Construction Construction Limited, (Respondent). (*Withdrawn*).

**2392-85-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Dozzi Masonry, (Respondent). (*Granted*).

**2413-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. Ottawa Concrete Flooring Company, (Respondent). (*Withdrawn*).

**2414-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. Amantea Masonry Contractors, (Respondent). (*Withdrawn*).

**2415-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. Joe Pantalone Masonry Ltd. and Rosto Construction Ltd., (Respondents). (*Withdrawn*).

**2421-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. W. G. McDonald Const., (Respondent). (*Withdrawn*).

**2423-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. G. T. M. Contracting, (Respondent). (*Withdrawn*).

**2424-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. A. MacKenzie & Associates Inc., (Respondent). (*Withdrawn*).

**2435-85-M:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Lodge 128, (Applicant) v. E. S. Fox Limited, (Respondent). (*Withdrawn*).

**2438-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Disney Display, (Respondent). (*Withdrawn*).

**2460-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Jomar Drywall Inc., (Respondent). (*Withdrawn*).

**2461-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Belmont Plastering Co., (Respondent). (*Withdrawn*).

**2462-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tampa Interior Systems Inc., (Respondent). (*Withdrawn*).

**2463-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. National Drywall Ltd., (Respondent). (*Withdrawn*).

**2472-85-M:** The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades (Glaziers), (Applicants) v. General Glass & Aluminum Company Limited, (Respondent). (*Withdrawn*).

**2496-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Batoni Construction Inc., (Respondent). (*Withdrawn*).

**2497-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Power Pac Construction Company Limited, (Respondent). (*Withdrawn*).

**2498-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Miwel Construction Limited, (Respondent). (*Withdrawn*).

**2499-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Kipling Paving Company Limited, (Respondent). (*Withdrawn*).

**2501-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. P.M.F. General Contractors Limited, (Respondent). (*Granted*).

**2502-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Ltd., (Respondent). (*Withdrawn*).

**2503-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Concord Concrete and Drain Inc., (Respondent). (*Withdrawn*).

**2507-85-M:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Kite Painting Company Limited, (Respondent). (*Withdrawn*).

**2510-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Andrew Paving and Engineering Limited, (Respondent). (*Granted*).

**2511-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Zicardo Construction Limited, (Respondent). (*Withdrawn*).

**2512-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Frank Plastina Investments Ltd., (Respondent). (*Withdrawn*).

**2513-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent). (*Withdrawn*).



**2515-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Unidrain Construction Limited, (Respondent). (*Withdrawn*).

**2516-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Pachino Construction Company Limited, (Respondent). (*Withdrawn*).

**2525-85-M:** Ontario Allied Construction Trades Council and L.I.U.N.A., Local 597, (Applicant) v. The Electrical Power Systems Construction Association and Spino Construction Co. Ltd., (Respondent). (*Withdrawn*).

**2535-85-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Twin City Tile Co. Ltd., (Respondent). (*Withdrawn*).

**2577-85-M:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. McKay Cocker Construction Limited, (Respondent). (*Withdrawn*).

**2583-85-M:** Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ekko Drywall Limited, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

**1669-84-R:** Labourers' International Union of North America, Local 1059, (Applicant) v. Brantco Construction, (Respondent). (*Denied*).

**0461-85-R:** United Food & Commercial Workers Union, Local 409, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors). (*Denied*).

**0255-85-R:** Canadian Paperworkers Union, (Applicant) v. Carlton Cards Ltd., (Respondent) v. Independent Greeting Card Workers' Union of Canada, (Intervener). (*Denied*).















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# ONTARIO LABOUR RELATIONS BOARD REPORTS

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## ONTARIO LABOUR RELATIONS BOARD

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# **ONTARIO LABOUR RELATIONS BOARD REPORTS**

**A Monthly Series of Decisions from the  
Ontario Labour Relations Board**

**Cited [1986] OLRB REP. MARCH**

**EDITOR: NIMAL V. DISSANAYAKE**

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**2234-85-R United Steelworkers of America, Applicant, v. Aurora Steel Service Limited, Respondent, v. Group of Employees, Objectors**

**Certification - Membership Evidence - Practice and Procedure - Employee collector using threats of loss of jobs in obtaining membership evidence - Membership evidence not given full weight - Vote directed - Board Member critical of law permitting extensive employer participation in certification proceedings**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *F. W. Murray* and *S. O'Flynn*.

**APPEARANCES:** *David Nicholson*, *John Harkins* and *Brando Paris* for the applicant; *William Challis* for the respondent; *Richard John Bayard* for the objectors.

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN AND BOARD MEMBER F. W. MURRAY; March 21, 1986**

1. This is an application for certification.
2. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, we further find that all employees of the respondent in the Town of Aurora save and except forepersons, persons above the rank of foreperson, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. We are satisfied on the basis of all the evidence before us that the applicant has filed evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made. This evidence of membership was filed prior to December 16, 1985, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
5. The respondent contends that the Board should not give any weight to union membership evidence obtained by Mr. James Pyle. Mr. Pyle is an employee of the respondent who acted as the collector with respect to most of the membership evidence filed by the applicant.
6. On December 2, 1985 Mr. Pyle was sitting in the company lunch room during working hours with some unsigned union cards. Two employees, Mr. Rick Bayard and Mr. John Fedotov separately came in to see him. Mr. Bayard and Mr. Fedotov testified that they were advised by another employee that Mr. Pyle wanted to see them. Mr. Pyle, however, testified that he did not send for the two employees, but rather they came to see him on their own initiative for the purpose of signing union cards.
7. Mr. Pyle testified that when Mr. Bayard and Mr. Fedotov came into the lunch room



they expressed a desire to sign a union card and did so without any prompting. In cross-examination, however, Mr. Pyle acknowledged that on an earlier occasion when he had been talking to another employee, Grant Curnow, about the union he had asked Mr. Curnow not to raise the matter of the union with either Mr. Bayard or Mr. Fedotov. Mr. Pyle testified that he made this request of Mr. Curnow because he wanted to approach Mr. Bayard and Mr. Fedotov about the union in his own way. Mr. Bayard and Mr. Fedotov both testified that when they separately met with Mr. Pyle, Mr. Pyle indicated that if they did not join the union, they could lose their jobs when the union came in. Under cross-examination, Mr. Bayard denied that Mr. Pyle might have been talking about what might happen if the union were to negotiate a "closed shop" provision in a collective agreement and an employee then refused to join the union. In this regard it is of some interest that when giving his testimony Mr. Pyle stated that he was not aware of what a closed shop was, or that some collective agreements required union membership as a condition of employment. It was the testimony of both Mr. Bayard and Mr. Fedotov that they signed a union card to protect their jobs. Both stated that at the time they signed the cards they understood that Mr. Pyle was speaking on behalf of the union, although subsequently both felt he probably had been talking only on his own behalf. Mr. Fedotov testified that he reached this conclusion that Mr. Pyle had likely been talking on his own behalf after Mr. Pyle indicated he did not care about employee concerns for their jobs. According to Mr. Fedotov, from this comment of Mr. Pyle he concluded that Mr. Pyle was simply trying to use the union as a weapon against Mr. Chin, the president of the respondent.

8. It was the testimony of Mr. Fedotov and Mr. Bayard that Mr. Pyle had frequently expressed the view that once the applicant was certified, employees would be able to vote on whether the company would retain an employee by the name of Wayne Eagleson. Mr. Eagleson appears to have been highly unpopular among certain employees. Mr. Pyle testified that while he had heard such a statement being made by others, he had not made such a claim. The company then called in reply Mr. Grant Curnow. Mr. Curnow testified that on November 28, 1985 Mr. Pyle had talked to him about joining the union, and in so doing had not made any threats to him. However, stated Mr. Curnow, Mr. Pyle had stated that when the union came in, a vote would be taken in which employees could vote out Mr. Eagleson.

9. The comments about a vote being held with respect to Mr. Eagleson are not directly relevant to these proceedings. However, we feel it noteworthy that Mr. Curnow, an employee who makes no allegation of improper conduct or threats on Mr. Pyle's part, stated that he had heard Mr. Pyle refer to such a vote. Given that Mr. Curnow's evidence on point supports that of Mr. Bayard and Mr. Fedotov, we are not prepared to accept as true Mr. Pyle's contention that he had not stated that employees could vote to get rid of Mr. Eagleson. Our conclusion that Mr. Pyle was not telling the truth on this point, leads us to accept the evidence of Mr. Bayard and Mr. Fedotov over that of Mr. Pyle concerning what was said in the lunch room on December 2, 1985. Accordingly, we are satisfied that in order to get them to sign union cards Mr. Pyle indicated to both Mr. Bayard and Mr. Fedotov that if they did not sign they might find themselves out of work.

10. Section 46 of the Act provides that under certain circumstances a collective agreement can require union membership as a condition of employment. However, such a requirement can generally only be included in a collective agreement after a clear majority of employees have already voluntarily selected the trade union as their bargaining agent. The use of threats of loss of employment by either an employer or a trade union simply has no place during the course of an organizing campaign.

11. It has long been the Board's practice not to give full weight to membership evidence obtained by the use of threats of loss of employment. See *L.M. Welter Limited*, [1965] OLRB Rep. April 34 and *Chemtrusion Inc.*, [1979] OLRB Rep. Dec. 1150. A majority of the membership cards filed by the union are signed by Mr. Pyle as the collector. Given this fact, and our finding that Mr. Pyle used improper threats to get at least two employees to sign cards, we are of the view that this is an appropriate case in which to obtain the confirmatory views of employees in a representation vote.

12. This matter is currently set for continuation of hearing on March 26, 1986. Given our conclusion that a representation vote should be conducted among employees in the bargaining unit, the Registrar is to consult with the parties to ascertain whether any useful purpose will be achieved by continuing the hearing.

13. The matter is referred to the Registrar.

#### **DECISION OF BOARD MEMBER SEAN O'FLYNN;**

1. The majority based their decision on the credibility of Mr. Pyle, an employee with Aurora Steel Service Limited. Mr. Bayard, Mr. Fedotov and Mr. Curnow, a witness called by the employer, all said that Mr. Pyle had told them that if the union came in, an employee by the name of Mr. Eagleson could be voted out of his job. Mr. Pyle denied making that statement. Mr. Bayard and Mr. Fedotov further claimed that Mr. Pyle said that if they did not join the union, they could lose their jobs. On the other hand, Mr. Curnow said that Mr. Pyle had made no threats when he talked to him about joining the union. On the basis of the above discrepancies, the majority rejected the evidence of Mr. Pyle. I dissent from the majority decision. I gave the benefit of the doubt to Mr. Pyle, recognizing that there was room for confusion and misunderstanding.

2. The role that the OLRB allows employers to play in certification hearings offends commonly-accepted standards of fairness and justice. The vast majority of workers have to work for someone or for a corporation in order to live. In these days of high unemployment and particularly in the absence of available full-time jobs, workers are very dependent and are often scared of doing anything that might earn them the displeasure of their boss. In my experience employers who appear before the OLRB in certification hearings do so, in the main, in order to try to stop their employees from joining a union. Their real interest is to preserve their complete control over their employees. They don't put it like that, of course not. They assume the role of the altruistic white knight charging to protect their defenseless workers from being coerced or duped into joining unions. So they exercise all their pervasive and persuasive power in the work place directly or indirectly, threatening workers and organizing petitions against the union. Only employers who are stupid or blatant in their illegal activities get caught. Yet they are allowed to participate in certification hearings and pretend that they are acting in the interests of working men and women. There is a real conflict between the interests of employers and the interests of workers on issues of membership representation.

3. At the moment, employers are busy speaking out against the proposed Equal Pay Legislation. What are they saying? They claim that if this proposal is passed into legislation, it will hurt the interests of working women. That's a self-serving stance if ever there was one.

It is difficult to expose this kind of hypocrisy. Corporations do not have a mandate to speak out in the interests of working people. On the contrary, the *Corporations Act* dictates that corporations must act in the interests of their owners. History tells us that that is what they have done. Employers have fought against every piece of legislation that improved the position of working men and women in society. They opposed proposed legislation on child labour, on health and safety, on minimum wages, on protecting our water and our environment, to name but a few issues. That's the reality and the Ontario *Labour Relations Act* does not reflect that reality.

4. The employers are allowed to make representations at certification hearings on membership evidence and they do. There is a real conflict of interest here. The employer wants the non-union situation to continue, because dealing with employees on a one-to-one basis preserves his power and leaves the employees weak. Doctors, lawyers, teachers, nurses, and auto workers, amongst others, know that by joining together they are better able to protect and expand their interests and that's why they have formed unions. If it's good enough for doctors to have a strong union to act on their behalf, then it's good enough for working men and women to have a union. The involvement of employers at certification hearings is a strong disincentive to employees joining unions. The law should be amended to limit the participation of the employer to giving input on the shape of the bargaining unit. A model for such a change is section 32 of the *Labour Code of Quebec* which reads:

“Only the employees included in the bargaining unit and the interested Association of employees are deemed interested parties in determining the representative nature of the Association.”

The dependency of employees in the work place demands that the employer be excluded from involvement in any issue touching on the wishes of employees to join or not to join a union.

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**1351-85-R** The United Food & Commercial Workers, Local 206, and United Food & Commercial Workers Local 486, Applicant, v. **Canada Safeway Limited** and The Oshawa Foods Division of the Oshawa Group Limited, Respondent

**Sale of a Business - Three Safeway stores closed - Subsequent purchase of three closed stores together with twenty-two operational stores - Purchase of closed stores separate transaction - No inventory, employees or customers transferred - Transfer of assets and not sale of business**

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members F. C. Burnet and W. F. Rutherford.

**APPEARANCES:** Alexander Ahee and Barrie Baily for the applicants, and Bruce Binning and Paul Nielson for the respondent.

#### **DECISION OF THE BOARD; March 7, 1986**

1. This is an application for a declaration that there has been a sale of business within the meaning of section 63 of the *Labour Relations Act*. The union withdrew its related application under section 1(4) of the Act (File No. 2314-85-R).

2. In the early fall of 1984, Canada Safeway Limited ("Safeway") decided to close three of its stores in Hamilton and one store in St. Catharines. Later in the fall, it made the decision to close a store in Belleville and one in Mississauga. The Oshawa Foods Division of the Oshawa Group Limited (the "Oshawa Group") expressed an interest in purchasing these stores, particularly the three in Hamilton. The Hamilton stores were eventually transferred later in the fall to Super Tops. The Oshawa Group then ceased negotiating for the purchase of the remaining three stores.

3. Safeway closed its St. Catharines, Belleville and Mississauga stores (the "dark stores") in December 1984. Seniority and bumping rights were exercised by the employees pursuant to existing collective agreements and they were transferred to Safeway's operating stores in Ontario.

4. In February, 1985, negotiations between the Oshawa Group and Safeway recommenced. Safeway offered to sell its entire Southern Ontario operation to the Oshawa Group consisting of twenty-three operating stores in addition to the dark stores. The Oshawa Group initially rejected the offer but negotiations continued by phone.

5. On May 6, 1985, representatives of both companies held their first meeting to discuss a possible purchase. They eventually entered into a Master Asset and Purchase Agreement on June 24th according to which the Oshawa Group would purchase twenty-two of the twenty-three operating stores. Under the terms of this agreement, the purchase price was based on book value for fixed assets and leasehold improvements. Inventories were purchased based on their estimated replacement cost. The Oshawa Group further agreed to pay Safeway a percentage of gross revenues and assume any existing labour agreements and service contracts with respect to the twenty-two operating stores. On August 26th, 1985 the transaction closed. Fifteen of the operating stores were opened as IGA stores and seven as Food City stores. Safeway agreed to a non-competition clause throughout Southern Ontario.

6. Prior to May, the Oshawa Group decided to purchase the three dark stores in Belleville, St. Catharines and Mississauga whether or not they were able successfully to conclude an agreement with respect to the operating stores. Unlike these latter stores, they were unable to determine from revenues whether or not the dark stores were profitable. The decision to purchase these stores was based on the Oshawa Group's assessment that the stores, despite their closure, had business potential and that, with the proper promotion, a market could be recaptured.

7. Agreements were signed for these dark stores on the same day as the agreements for the operating stores, but there were significant differences in the purchase arrangements. Although fixed assets and leasehold improvements were purchased at net book value, there was no reservation of income, no inventory, material or supplies, and in the absence of employees, no assumption of labour agreements. To make the stores operational, the Oshawa Group spent \$800,000 on the Belleville store, \$750,000 on the St. Catharines store, and \$500,000 on the Mississauga store. The prices paid for the equipment and leasehold improvements in these stores were, respectively \$100,000, \$100,000, and \$93,000. The closing of the dark stores transaction took place on July 9, 1985. The Oshawa Group opened the Belleville store for business on December 11, 1985, the St. Catharines store on October 23, 1985, and the Mississauga store on February 25, 1986. The stores were opened under the Food City banner and almost all of the full-time employees in these stores were transferred from existing Food City stores. All of the part-time employees were hired through local Canada Manpower Centres. Outstanding service contracts were assumed by the Oshawa Group in all the stores.

8. The union called no evidence and does not dispute the facts. Its argument is that the facts disclose a single transaction, albeit for two sets of stores. It points out that the agreements for both the dark stores and the operating stores were concluded on June 24, 1985, that the failure to recognize the collective agreements for the dark stores erodes existing bargaining rights, and that the union should not be penalized because the Oshawa Group delayed opening the stores pending extensive renovations. The union points out that the effect of excluding these three stores from the total purchase package is to preclude the union and its employee members from the opportunity of exercising rights they previously had, notwithstanding that bumping rights had been exercised by Safeway employees pursuant to the collective agreements when the three stores were closed. The Union does admit, however, that if only the three dark stores had been purchased, s.63 would not apply.

9. The company's position is that although both sets of transactions were concluded on the same day, they were formalized together for convenience and consistency. The uncontradicted evidence is that these were two separate deals, that they were not conditional upon one another, and that the dark stores would have been purchased whether or not the operating stores were. The dark stores were not purchased as an operating business. They had been closed by Safeway well before the Oshawa Group agreed to buy them, and there was no existing inventory or clientele. The extensive renovations were necessary because the dark stores were, in their purchased state, incapable of functioning as a business, lacking facilities and inventory. Moreover, the Oshawa Group wanted to revise substantially the inventory and design of the dark stores to make each attractive to the local market. Outstanding service contracts to supply such services as snow-removal were assumed in all twenty-five stores for convenience. They were not, the company argues, essential services, and were peripheral to the agreement to purchase the stores.

10. The company denies the suggestion that it is eroding bargaining rights. It argues that it willingly assumed them in the twenty-two stores, and in no way interfered with the operation of the bumping provisions exercised under the collective agreements when the stores were originally closed. In purchasing these three dark stores, it did not purchase goodwill or an ongoing business. In these circumstances, the company alleges that the imposition of the old collective agreements creates bargaining rights where none ought reasonably to exist.

11. In our view, the purchase of the three dark stores was a separate legal transaction from the sale of the twenty-two operating stores, both in character and in fact. The Oshawa Group was prepared to purchase these three stores whether or not it was able to negotiate a deal for the operating Safeway Stores. What the Oshawa Group purchased when it bought the St. Catharines, Belleville and Mississauga stores were three buildings formerly used for and convenient to the operation of supermarkets. No inventory and little or no customer base existed to be transferred in view of the substantial hiatus between the closing of the stores by Safeway and their opening by the Oshawa Group under its Food City banner. The stores could not reopen without extensive renovations, but neither this fact nor the length of the closure of the stores is necessarily determinative. Where a store is purchased, the fact that it is being refined or redesigned, the fact that some of the product lines are being revised, or the fact that this may require closing the business for a period of time, will not in most circumstances preclude a finding that there has been a sale of a business within the meaning of section 63 of the Act. In this case, however, the purchase of the three dark stores was not the purchase of a business; rather, it was the purchase of a moribund operation, without inventory, employees or customers. The three stores were closed months before a deal was struck or before a potential purchaser was identified. Where, as in this case, the totality of the circumstances indicate that it is not a "business" but merely its physical shell which is being purchased, there is no basis for invoking the operation of section 63. We are satisfied that the purchase of the three dark stores represents a transfer of assets, and not the sale of a business.

12. For all of the foregoing reasons, the application is dismissed. In making our decision, we reviewed the following cases referred to us by counsel:

*Amalgamated Meat Cutters and Butcher Workmen of North America, Local 633 v. Dutch Bay Food Markets*, 65 CLLC 16,051; *Food Handlers' Local Union 175, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, C.L.C. v. L&M Food Market (Ontario) Limited*, [1965] OLRB Rep. Sept. 440; *Food Handlers' Local Union 175, Amalgamated Meat-Cutters and Butcher Workmen of North America, AFL-CIO, C.L.C. v. Leader's Clover Farms Food Market*, [1966] OLRB Rep. Nov. 636; *Canadian Food and Allied Workers and Local Unions 175 and 633 v. Loblaws Limited and Gordons Markets*, [1978] OLRB Rep. Dec. 1102; *Union of Canadian Retail Employees, Local 1000 v. More Groceteria Limited, Douglas R. More, and Loblaws Limited*, [1980] OLRB Rep. April 486; *Commercial Workers Union, Local 486 v. Steinberg Inc., and Yesteryear Grocers Inc., v. Group of Employees*, [1982] OLRB Rep. Dec. 1975; *Retail, Wholesale and Department Store Union, Local 414 v. Ancaster Supermarkets Limited, c.o.b. as I.G.A.*, [1984] OLRB Rep. April 604; *Graphic Communications International Union, Local 211 v. W. F. Stevens Reproductions Inc. v. Thorn Press Limited*, [1984] OLRB Rep. April 674; *Retail, Wholesale and Department Store Union, Local 414 v. 564070 Ontario Inc., c.o.b. as Gilham Foods, Greg Guilfoil and Doug Hann v. Dominion Stores Ltd.*, [1984] OLRB Rep. Oct. 1423; *Penmarkay Foods Limited v. Retail Wholesale and Department Store Union, Local 414; Retail Wholesale and Department*



*Store Union, Local 414 v. Dominion Stores Limited, Willett Foods Limited, Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214; *Retail Wholesale and Department Store Union Local 414 v. 555190 Ontario Ltd. c.o.b. as Valencia Foods, Retail, Wholesale and Department Store Union, Local 414*, [1984] OLRB Rep. May 773; *Queensway Foods Ltd. v. Group of Employees* [1984] OLRB Rep. Feb. 358; *Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 607 v. Thunderbrick Limited, Thunder Tile Limited and Great Lakes Ceramics Inc. v. Group of Employees*, [1985] OLRB Rep. Aug. 1225; *United Food and Commercial Workers, Local 206 v. Keele-Wilson Supermarket Limited v. Group of Employees*, [1985] OLRB Rep. March 425; and *Local Union 633 and Local Union 175, Canadian Food and Allied Workers v. Zehrs Markets Limited v. Busy B Discount Foods Limited v. Group of Employees*, [1974] OLRB Rep. May 331.

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**0089-85-R** United Brotherhood of Carpenters and Joiners of America, Local 1256, Applicant, v. **Capricorn Acoustics & Drywall Ltd.** and **J & J Drywall & Painting**, A division of Silver Cloud Construction Limited, Respondents

Practice and Procedure - Related Employer - Conditions for related employer finding clearly satisfied - Whether onus shifting to respondents to persuade Board not to exercise discretion - Delay, lack of erosion of work and circumstances of origin of bargaining rights causing Board not to exercise discretion

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members B. L. Armstrong and I. M. Stamp.

**APPEARANCES:** Norman L. Jesin and Ron Carleton for the applicant; Joe Carrier, John Horkits and Olga Horkits for the respondents.

**DECISION OF THE BOARD;** March 24, 1986

1. This applicant applies under sections 63 and 1(4) of the *Labour Relations Act* for a declaration that J & J Drywall, a Division of Silver Cloud Construction Ltd., hereinafter referred to as J & J Drywall, is bound by the provincial agreement to which the applicant and Capricorn Acoustics and Drywall Ltd., hereinafter referred to as Capricorn, are bound.

2. John Horkits and his wife, Olga Horkits are the principals of both J & J Drywall and Capricorn. J & J Drywall has been a drywall contractor, principally in the residential sector of the construction industry in the Sarnia area since 1973. Its employees have never been represented by a trade union. It has also occasionally done construction work in the industrial, commercial and institutional sector of the construction industry, and in the late 1970's, began to actively seek commercial drywall work. J & J Drywall began as a partnership of John Horkits and Joseph Ranoszstay and later became an operating division of Silver Cloud Construction Limited with Mr. Horkits and Mr. Ranoszstay as the principal shareholders. As a result of the change in business emphasis from residential to commercial work advocated

by Mr. Horkits, Mr. Ranoszstay transferred all of his shares in Silver Cloud Construction Limited to Olga Horkits in April, 1978. From that time forward, J & J Drywall actively bid on and was successful in obtaining many commercial drywall contracts while continuing with its traditional residential drywall work. J & J Drywall has held itself out to the public as both a residential and commercial/industrial drywall contractor for many years.

3. In late 1979, Mr. Horkits learned that a Eaton Centre shopping development would be built in Sarnia and that only unionized sub-contractors would be used on that construction project. Mr. Horkits also wanted to expand his commercial and industrial work by doing work within the industrial plants in Sarnia. In order to be eligible to work on the Eaton Centre project and in the large industrial plants, Mr. Horkits felt that it was necessary to have a collective bargaining relationship with the applicant. To this end, Mr. Horkits asked Mrs. Horkits to get in touch with the applicant to obtain information about the union.

4. Mrs. Horkits and Gerald Lacasse, the business manager of the applicant at the time, met in early 1980. Mrs. Horkits recalled that the first meeting with Mr. Lacasse occurred in January 1980 while Mr. Lacasse testified that the first time he met with Mrs. Horkits was in April 1980. Capricorn was incorporated in February 1980 and was the vehicle that Mr. and Mrs. Horkits intended to use for operating their unionized drywall business.

5. Mr. Lacasse and Mrs. Horkits had differing recollections of that initial meeting. It is clear that Mrs. Horkits explained to Mr. Lacasse that she and her husband were interested in expanding their business to get into bigger commercial and industrial jobs. While Mr. Lacasse did not recall any discussion with Mrs. Horkits about J & J Drywall, Mr. Lacasse testified that Mr. Horkits told him about J & J Drywall at some time before the applicant and Capricorn signed a voluntary recognition agreement, and expressed his concern about the effect that a collective bargaining relationship with the applicant would have on J & J Drywall's business. Mr. Horkits told Mr. Lacasse that he did not want J & J Drywall to be a union shop. Mr. Lacasse recalled that Mr. Horkits told him that J & J Drywall was primarily a residential contractor. Mr. Lacasse testified that he did not know about J & J Drywall doing commercial work when he talked with Mr. and Mrs. Horkits in April, 1980, except with respect to one job. Mr. Lacasse stated that Mr. Horkits assured him that any work done in the industrial, commercial and institutional sector of construction industry would be done through Capricorn, and that J & J Drywall would only do residential work. The recollection of Mr. and Mrs. Horkits of those conversations with Mr. Lacasse differed from Mr. Lacasse's recollection. While they agreed that Mr. Horkits expressed concern over maintaining J & J Drywall as a non-union business, Mr. Horkits and Mrs. Horkits recalled advising Mr. Lacasse that they did commercial and industrial work through J & J Drywall and that they wished to be able to continue doing that same type of work as they had before. They said Mr. Lacasse assured them that the applicant would not affect J & J Drywall doing the work it had been doing. They testified that they advised Mr. Lacasse that any union work would be done by Capricorn, and not J & J Drywall.

5. In our opinion, it is more probable that Mr. Lacasse was told by Mr. and Mrs. Horkits that they wanted the business of J & J Drywall to continue as it had before. We are satisfied that when Mr. Lacasse and Mr. and Mrs. Horkits spoke, Mr. and Mrs. Horkits referred to union work as being the work Capricorn would do, that is, work for unionized general contractors or work for clients that required a unionized work force, such as the industrial plants in the Sarnia area. Mr. Lacasse probably understood union work to mean

work coming within the industrial, commercial and institutional sector of the construction industry.

6. Since the voluntary recognition agreement that was ultimately signed was between Capricorn and the applicant, we are satisfied the applicant knew or ought to have known that the work that J & J Drywall was doing in the industrial, commercial and institutional sector of the construction industry would be the kind of work that J & J Drywall would continue to do. The recognition agreement that the applicant wanted the Horkits to enter into expressly related to only the industrial, commercial and institutional sector of the construction industry. If the applicant's understanding was that all industrial, commercial and institutional sector work would be done under the collective agreement and all residential work would be done non-union, it would have been a simple matter for the applicant to have required that J & J Drywall, and not Capricorn, execute the agreement.

7. The recognition agreement between Capricorn and the applicant was signed on May 13, 1980. Both before and since that date, J & J Drywall has done drywall and other construction work that falls into both the industrial, commercial and institutional sector and the residential sector of the construction industry. From 1980 to 1985, J & J Drywall undertook many jobs that were within the industrial, commercial and institutional sector of the construction industry, several of which were quite small.

8. Although the applicant tried to suggest that it was unaware of the work that J & J Drywall was performing in the industrial, commercial and institutional sector, it had specifically investigated work done by J & J Drywall at a church in May of 1984. The applicant initially claimed that J & J Drywall ought not to be performing that work, but took no further action when it learned that J & J Drywall had contracted for that work directly with the owner, and was not a sub-contractor to the unionized general contractor on the job at the time. Furthermore, Mr. Lacasse quite candidly stated in his examination-in-chief that it would be hard for an employer to be working non-union in the industrial, commercial and institutional sector in Lambton County, where Sarnia is located, without being detected by the applicant. While the applicant knew of the church job in May of 1984, nothing was done by the applicant until April 1985 when this application was filed with Board.

9. The employees of J & J Drywall became members of the applicant some time after the recognition agreement was signed by Capricorn. At that time, they informed the applicant about their experience performing work in the industrial, commercial and institutional sector while employed by J & J Drywall. Furthermore the applicant's evidence that it would be difficult to work as a non-union contractor in the industrial, commercial and institutional sector without the applicant knowing about it, and the church job that took place in May 1984 that the applicant investigated, but did nothing about satisfies us that the applicant knew J & J Drywall was working in the industrial, commercial and institutional sector throughout the period after the voluntary recognition agreement was signed.

10. Counsel for the respondents conceded at the outset of the hearing that the respondents carry on associated or related activities under common control or direction. He submitted that this case turns on whether the Board would exercise of its discretion under subsection 1(4) of the Act to grant the declaration requested.

11. Counsel for the applicant argued that the respondents have the burden of persuading



the Board not to exercise its discretion to make the declaration sought when the conditions precedent for the declaration have been established. In other words, counsel for the applicant submitted that a declaration under subsection 1(4) should issue once the Board finds, or the respondents concede, that they carry on related activities or business under common control or direction unless the Board is persuaded by the respondents that a declaration should not issue. Counsel cited no authority for that proposition.

12. In our view, that submission has no merit. It is the applicant that seeks relief by way of a declaration under subsection 1(4) of the Act. Ordinarily, the party that seeks relief has the burden of establishing its entitlement to the relief it seeks. There is nothing in subsection 1(4) that changes that ordinary approach taken in matters before this Board. Indeed, the obligation that section 1(5) imposes on respondents, which requires the respondents to adduce evidence in circumstances in which they might not otherwise do so (see *Canada Cement Lafarge Ltd.*, [1977] OLRB Rep. Jan. 5) suggests that the legislature contemplated some changes in the ordinary procedure used in matters before the Board in applications under subsection 1(4), but chose not to shift the burden of proof or persuasion to the respondents in this type of an application. Had the legislature wanted the respondents to bear the burden that the applicant suggests they have under the Act, it could have done so explicitly as it did in subsection 89(5) of the Act.

13. In *Hexagon Contracting Ltd.*, [1971] OLRB Rep. Sept. 554, the Board held that the onus that rests upon an applicant in subsection 1(4) cases is the same onus that an applicant has in sale of business cases. The burden of proof in sale of business cases rests with the party alleging that a sale of a business has taken place. (See *Super City Ltd.*, [1964] OLRB Rep. May 93; *Super City Discount Foods Ltd.*, [1969] OLRB Rep. Aug. 666; and *Woodway Structural Components*, [1971] OLRB Rep. Aug. 545.) The amendments to the Act in 1975, when subsections 1(5) and 63(13) were enacted did not change the burden of proof. Those provisions simply imposed a duty of disclosure on respondents to applications made under those sections of the Act. In the *Hexagon Contracting Ltd.* decision, *supra*, the union that sought to invoke subsection 1(4) led evidence to establish that the employers carried on related activities under common control and direction, and submitted to the Board that the onus therefore shifted to the employers. The Board did not accept that submission and held that the onus rested upon the union seeking the declaration to satisfy the Board that the employers *should be treated as one employer*.

14. Counsel for the applicant submitted that the respondents attempted to camouflage the industrial, commercial and institutional sector construction work performed by J & J Drywall by paying one employee working for J & J Drywall through the Capricorn payroll and making remittances to the union on behalf of that employee. The evidence established that the employee in question requested that particular arrangement in order to obtain credit for hours worked for purposes of his apprenticeship in the applicant. Furthermore, we are satisfied that J & J Drywall carried on its business in the industrial, commercial and institutional sector quite openly. The applicant was not misled by either of the respondents or their principals. Indeed, when the work done by J & J Drywall on the church in May 1984 was investigated by the applicant, there was no attempt to suggest to the applicant that Capricorn and not J & J Drywall was doing that work.

15. The applicant submits the the Board should issue the declaration requested and relied on the criteria the Board has developed over the years for exercising its discretion under this

subsection of the Act. The Board in *Ethyl Canada, Inc.*, [1982] OLRB Rep. July 998 described the purpose of subsection 1(4) in the following terms:

“Section 1(4) of the Act deals with situations where the economic activity giving rise to the employment is or can be carried out through more than one legal entity. In such circumstances an alteration in legal form, or a transfer of work from one legal entity to another, can undermine established collective bargaining rights. Section 1(4) ensures that the institutional rights of the trade union and the contractual rights of its members, will attach to a definable commercial activity rather than the particular legal vehicle(s) through which that activity is carried on. Legal form is not permitted to obscure economic and collective bargaining realities. In this respect section 1(4) creates a regime of collective bargaining law which significantly modifies common law notions of privity of contract or the corporate veil. However, while the language of section 1(4) is very broad, the section is not intended to apply in every case which in a general or linguistic sense meets its statutory criteria. The Board has a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully, in light of the circumstances of each case, and labour relations policy considerations.”

16. The criteria used by the Board in determining whether to exercise that discretion were set out in *John Hayman and Sons Co. Ltd.*, [1984] OLRB Rep. June 822 at 827-28:

- “(1) whether the applicant is seeking to acquire bargaining rights by means of section 1(4) in order to avoid the certification procedures of the Act;
- (2) whether a declaration would disturb existing bargaining rights;
- (3) whether a declaration would interfere with the interests and rights of employees to select their own bargaining representative or to remain unrepresented;
- (4) whether the application has been made within a reasonable time after the applicant became, or with reasonable diligence, should have become aware that the two or more entities were closely related; and
- (5) whether a scheme exists which would effectively defeat bargaining rights by transferring work from one related entity to another.”

17. In *Donald A. Foley Ltd.*, [1980] OLRB Rep. April 436, the Board stated:

“One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive.”

18. Counsel for the applicant forcefully argued that the criteria described by the Board in the *John Hayman and Sons Co. Ltd.* case, *supra*, should lead the Board in this case to grant the declaration requested. Counsel for the applicant also argued that even if the Board were to find that the applicant, in 1980, gave the assurances as claimed by Mr. and Mrs. Horkits, the subsequent conduct of Capricorn and J & J Drywall, in paying one J & J Drywall employee through Capricorn's payroll and by having, the applicant alleges, J & J Drywall do the work that ought to have been Capricorn's work, a declaration should issue, to be effective from the date of the declaration.

19. While the payment of the one J & J employee through the Capricorn payroll suggests

that the two respondents carried on their activities as if they were one entity to the prejudice of the applicant, a number of factors militate against the granting of the declaration requested by the applicant. The applicant argues that J & J Drywall has encroached upon and performed the work that would otherwise have been done by Capricorn. The facts of this case do not support that argument. Prior to the creation of Capricorn, J & J Drywall had been doing some work in the industrial, commercial and institutional sector of the construction industry. Furthermore, the amount of industrial, commercial and institutional work done by J & J Drywall has declined since Capricorn was incorporated. Capricorn's business, on the other hand, has fluctuated and except for Capricorn's first year of operation, the work done by J & J Drywall in the industrial, commercial and institutional sector of the construction industry has been approximately one-half or less of the amount of work done by Capricorn. Thus, it appears to us that Capricorn has continued to be active in the industrial, commercial and institutional sector, and there is insufficient evidence for us to find that work which Capricorn would have performed was transferred to J & J Drywall.

20. In addition to the factors of delay and lack of erosion of work militating against the applicant, an additional significant factor that weighs against the exercise of discretion to make the declaration are the circumstances that gave rise to the creation of the applicant's bargaining rights. The applicant, through Mr. Lacasse, was aware of J & J Drywall carrying on some construction work in the industrial, commercial and institutional sector at the time the recognition agreement between Capricorn and the applicant was entered into. The applicant made no effort at that time or subsequently to prevent J & J Drywall from doing work in the industrial, commercial and institutional sector nor did it try to have the industrial, commercial and institutional sector work that J & J Drywall was doing moved to Capricorn until these proceedings were commenced in 1985.

21. Furthermore, we find it particularly significant that Capricorn had no employees when it signed the recognition agreement in May 1980. J & J Drywall employed several tradesmen engaged in drywall work at that time. Indeed, subsequent to the signing of the recognition agreement, some of the employees of J & J Drywall approached the applicant at the suggestion of Mr. Horkits to become members. When they did so and were accepted into membership, they were referred by the applicant to work for other employers. Capricorn did not begin to employ tradesmen for several months.

22. In *Gerald Davidson Plumbing and Heating Limited*, [1984] OLRB Rep. March 462, the Board commented on circumstances somewhat similar to the situation before the Board in this case. In that decision, the Board wrote at page 466:

"In the present case there is no doubt that the statutory preconditions for section 1(4) are met. The numbered company really has no separate or independent existence. It is little more than a bank account and a payroll mechanism for dealing with the few unionized workers that the company has been called upon to hire from time to time. ... This is precisely the kind of situation where, ordinarily, a section 1(4) declaration would be warranted.

However, there are countervailing considerations. This is not a case in which a unionized firm has spawned a non-union offspring designed to siphon away work from the unionized enterprise to the detriment of the union members working there. ... there is little indication that work opportunities destined for the numbered company have been redirected to Gerald Davidson Plumbing & Heating Limited. The latter company has not been used surreptitiously on unionized job sites to the detriment of the numbered company and its potential employees, nor has there been any real departure from its established practice of bidding on



non-union jobs. It was and continues to be a non-union contractor with its own field crews, as it has been since 1970.

More important, however, is the fact that at the time of the purported voluntary recognition agreement, the union did not represent *any* of the employees potentially bound by it - some of whom had been employed by Gerald Davidson Plumbing & Heating Limited for some years. Those employees had no appetite for collective bargaining then and do not want the union now. We see no reason why collective bargaining should be thrust upon them, or why the union's bargaining rights should be thus extended. Indeed, if the agreement had purported to apply to Gerald Davidson Plumbing & Heating Limited and had been challenged, we would be inclined to say that it was void, since the union had no right to represent any of the employees affected at the time the agreement was executed. It was not a "pre-hire" agreement of the kind considered by the Board in *Nicholls Radtke*, [1982] OLRB Rep. July 1028. Even assuming (without finding) that on August 11, 1980 there was a misrepresentation leading to the execution of the voluntary recognition agreement, we still do not think the circumstances of this case warrant a declaration under section 1(4) of the Act. We would not condone such misrepresentation and it might well justify a union withdrawal from that arrangement. But the remedy in the circumstances of this case is not a section 1(4) declaration."

23. In *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, the Board, in dismissing an application for a related employer declaration under subsection 1(4) wrote at page 849:

"In a number of cases the Board has observed that section 1(4) is designed to *preserve* rather than *extend* bargaining rights. It is not to be used as a substitute for certification. (See *Farquhar Construction Ltd.*, [1978] OLRB Rep. Oct. 914 and cases cited therein; *H. Allaire & Sons Co. Ltd.* [1974] OLRB Rep. July 457; *Inducon Construction*, [1975] OLRB Rep. Apr. 399; and, most recently *W.M.I. Waste Management*, [1981] OLRB Rep. March 409.) In our view, that is precisely what the union is trying to do in this case, where there was an established business and employee complement predating the bargaining relationship, and no evidence of a concrete erosion of the union's bargaining rights. Accordingly, the Board is not prepared to exercise its discretion to issue a section 1(4) declaration. If the union wishes to acquire bargaining rights for the Pinehurst employees, it will be necessary to enroll them into membership, and apply for certification."

Similarly, in this case, J & J Drywall was an established business doing some work in the ICI sector with its own employee complement prior to the applicant's acquiring bargaining rights through a voluntary recognition agreement with Capricorn. If the applicant wishes to represent the employees of J & J Drywall, it must persuade them to join it and then apply for certification. While J & J Drywall has not been active since these proceedings commenced, it may be in the future. Although counsel for the applicant suggested that the respondents could avoid certification of J & J Drywall by simply saying that Capricorn is performing the work, it appears to us that the applicant could ascertain whether employees working on any particular job for either of the respondents are employed pursuant to the collective agreement. If no deductions or remittances are being forwarded to the applicant, or if the persons employed on the job are not members of the applicant, it would be difficult for the respondents to argue that Capricorn is their employer.

24. On the basis of the foregoing, we are not persuaded to use the discretion that the Board has under subsection 1(4) of the Act to grant the declaration requested.

25. There was no evidence that would cause the Board to find that there has been a sale of business within the meaning of the Act from Capricorn to J & J Drywall, and counsel for the applicant did not argue that the applicant was entitled to a declaration under section 63 of the Act.

26. This application is hereby dismissed.

27. The Board's decision of June 5, 1985 in Board File No. 0428-85-M adjourned a referral of a grievance to arbitration under section 124 of the Act between the applicant and Capricorn pending the disposition of the application in this matter. If either party desires to have the matter in Board File No. 0428-85-M brought back for hearing, that party must file such a request with the Registrar within 15 days of the date of this decision. If no request is filed within that time, that matter will be dismissed.

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**2790-85-R** International Association of Machinists and Aerospace Workers, Applicant,  
v. **Custom Pharmaceuticals Ltd.**, Respondent

**Certification - Practice and Procedure - Whether adequate notice of certification application - Whether Sunday regarded as day of notice - No employees making representations of inadequate notice - Whether terminal date extended solely at employer's request**

**BEFORE:** *S. A. Tacon*, Vice-Chairman, and Board Members *F. C. Burnet* and *K. V. Rogers*.

**APPEARANCES:** *Jack Cunningham*, *Mike Daley* and *Donald Bate* for the applicant; *W. J. Hayter*, *H. P. Thode* and *J. Fitzpatrick* for the respondent.

**DECISION OF S. A. TACON, VICE-CHAIRMAN AND BOARD MEMBER K. V. ROGERS;** March 27, 1986

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The respondent raised a preliminary motion requesting the extension of the terminal date. The Board heard argument with respect to this issue and made the following oral ruling:

The Board has considered the submissions of the parties with respect to the respondent's preliminary motion that the terminal date should be extended. The Board is responding to the motion on the *assumption* that, as asserted by the respondent, the Board notices were received February 20, 1986, at 10:00 o'clock a.m. The Board also accepts the criteria set out in *Kilean Lodge Incorporated*, [1977] OLRB Rep. Apr. 240, as confirmed in the other cases referred to by the respondent.

In the view of the majority, (Board Member Burnet dissenting), however, the application of those criteria do not lead to the conclusion that the terminal date should be extended. Firstly, the majority notes that the dates

set by the Registrar do, in fact, comply with Rule 2, i.e., the terminal date was set for February 24th following receipt of the application on February 12th and the Board notices were mailed on February 14th. The issue then becomes one of adequate notice in the context, as noted, of the *Kilean Lodge* criteria. Excluding Sunday, for the moment, there were four days of notice. There is nothing to indicate the number and location of notices were inadequate given the number of employees in the bargaining unit and their shift schedule. With respect to the last criterion in *Kilean Lodge*, though, this request is not made by any employees but *solely* by the respondent. Further, the fact that the notice was posted at 4:00 o'clock p.m. rather than 10:00 o'clock a.m. on the Thursday is as a result of the respondent's decision. The majority does not agree that, if the respondent chooses to seek legal advice before the posting the Board notices, that delay can be raised by the respondent in a request for an extension of the terminal date.

The respondent argued that no adverse inference could be drawn from the failure of any employees to appear and, indeed, that one could conclude that the non-appearance was supportive of its position. The majority does not agree. There is no need to speculate as to why the employees are not here; the fact is none have appeared. And, the notice of hearing was more than sufficient to enable interested employees to attend if any wished to raise concerns. In the majority's experience, employee objectors have not been reluctant to express their views, indeed, many do so without representation by counsel. The fifth criterion enunciated in *Kilean Lodge* cannot be read except as to note the relevance of only the respondent seeking the extension, i.e., that that is less compelling than where the actual employees in the perspective bargaining unit are expressing *their* opinions about *their* potential bargaining agent.

Accordingly, the majority, on the basis of the foregoing, declines to exercise its discretion under section 57(2) of the Rules to extend the terminal date.

4. The majority hereby confirms its oral ruling. The majority has read the dissent of Board Member Burnet and would add the following comments. As noted in the oral ruling, the Registrar *did* comply with Rule 2, i.e., the terminal date was set not less than five nor more than ten days after the date of mailing of the notices to the employer. "Sundays" and other holidays are not to be included in that calculation. However, the dissent imposes the *same* criteria as in Rule 2 to the issue of *adequate notice* to employees. With respect, the question of adequate notice is, and always has been, a separate issue. There is no compelling reason for discounting "Sunday" in considering whether the actual notice to employees is adequate. There is nothing improper about gathering signatures on a petition on a Sunday or other holiday. Indeed, collecting signatures away from company premises and not during working hours is far preferable. Thus, the Board did not fail to enforce its own regulations, as suggested in the dissent.

The majority considered the actual notice given employees to be adequate. Firstly, the notices were posted, *inter alia*, where the employees "clocked out". On the Thursday, both groups



on the day shift (leaving at 4:00 p.m. and 4:30 p.m. respectively) had the opportunity of reading the notices. Of course, the night shift had a much longer period to do so. Thursday was regarded as one day; Friday as the second. The majority sees no reason not to count Saturday as day three and Monday as day four. The employees could send a statement of desire to the Board by registered mail dated Monday and still comply with the terminal date. The majority considered those four days sufficient and, in the oral ruling, did not reach a determination as to whether Sunday should count. Given the above comments, however, the majority considers that Sunday should be regarded as a “fifth” day of notice.

It must also be stressed that *no* employees appeared at the hearing. The terminal date certainly allowed employees, even those perhaps confused by the wording on the Board notices, the opportunity to obtain legal advice, to be informed that, notwithstanding the terminal date, employees could appear at the hearing and make representations about various matters, including an extension of the terminal date. In this instance, a sizable majority (80%) of the employees had signified support for the applicant through the signing of membership cards. No employee, in person or in writing, signified opposition. The majority was, and is, not prepared, on the basis of *speculation* and *possible* employee opposition to accede to a request solely by the *respondent* to extend the terminal date and thereby delay the certification of the applicant and subsequent representation of the employees in the bargaining unit.

5. The parties continued their discussions before a Board Officer and reached agreement on all matters in dispute and signed a waiver, subject to the respondent’s right to challenge the oral ruling.

6. Having regard to that agreement, the Board finds that all employees of the respondent in the Town of Fort Erie, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory personnel, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on February 24, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

## **DECISION OF BOARD MEMBER F. C. BURNET;**

1. While the interests of both the applicant union and the respondent employer are legitimately involved in this issue, the primary interest is that of the employees themselves. It concerns their right to free expression of their views either in support of or in opposition to the certification application. Moreover, apart from the intrinsic merits of such rights in a democratic society, they go to the heart of the promotion of harmonious labour relations to which the Act, in its preamble, is dedicated. The development of such harmonious relations requires that the bargaining agent has been freely selected by a majority of employees and that this fact is apparent to the other parties of interest, the union and the company.

2. To this end, the Board regulations require that a terminal date be established, not less than five days nor more than ten days after the date on which the Registrar mails to the employer the notice of application for certification of the union; and that the employees be advised by the posting of provided notices that this period is reserved to employees for further expressions of support for, or opposition to, the application.
3. The Board notices were dated and presumably mailed February 14th, and specified a terminal date of February 24th. On the assumption of overnight mail delivery and prompt employer posting, the period to be allowed employees was thus contemplated to be at or near the ten day maximum.
4. The employer stated that the material from the Board was not received until about 10:00 a.m., Thursday, February 20th and was posted in the plant about 4:00 p.m. that same day. The effective period for employees to register objections to, or further support of, the application was thus from 4:00 p.m., Thursday, February 20th to the close of the post office business day on the terminal date of Monday, February 24th, presumably about 6:00 p.m. The *actual* time given to employees was thus only several hours in excess of four days.
5. Regulation (1)(2) provides that time periods specified in the Regulations shall be exclusive of holidays and a frontispiece to the published Regulations states that in accordance with the Interpretations Act, Sundays are holidays. The majority decision nevertheless includes Sunday in its computations. Applying this Regulation, the legally defined time from posting in the plant to the terminal date shrinks to slightly over three days. In any case, both the actual time allowed and the legally defined time were less than the prescribed five day minimum.
6. The majority, in concluding that the minimum had been met, also counted Thursday, February 20th as the first day, even though over 80% of employees were not provided the information until the end of that work day, which occurred at 4:00 and 4:30 p.m. respectively, for each of two equal sized groups. I disagree with this conclusion. To argue that anyone given notice of any work event at the end of his work day has thereby already received one day's notice of the event is not supportable in logic nor in equity.
7. The Board did not take evidence as to when the material was actually mailed from the Boards' office or received by the employer, nor in my opinion is this pertinent to the issue. Any delinquency or deficiency, if such there was, by other parties, whether the employer, the postal service, or the Board itself, should not serve to extinguish employee rights to express their representational desires within the prescribed time.
8. The fact that no employees appeared at the hearing is neither conclusive nor persuasive evidence that they had in effect waived their rights. The posted Board's notice itself unequivocally states that the Board will not accept objections after the terminal date. In any event, the issue is not whether the employees wished to object or were dissuaded from doing so, but simply the preservation of their right to do so, whether exercised or not; and the enforcement by the Board of its own Regulations.
9. Under these circumstances, I think there was a failure to provide the five day minimum stipulated in the Regulations. However caused by other parties, the failure contravenes the spirit and letter of the Regulations and represents a denial of natural justice to employees. I would accordingly have extended the terminal date appropriately.

**2310-85-R** Therese Laframboise and Yolande Pichette, Applicants, v. Service Employees Union, Local 219, Respondent, v. **Domus Building Cleaning Co. Ltd.**, Intervener

**Petition - Termination - Petition circulated by friend of member of management - Whether employee perception that petition will be disclosed to management - Whether existence of employee dissatisfaction with union relevant**

**BEFORE:** *Robert J. Herman, Vice-Chairman, and Board Members W. A. Correll and C. A. Ballentine.*

**APPEARANCES:** *Stephen Acker and Deborah Carlson for the applicant; William Love and Gerry Goyer for the respondent; George W. Oakes and Rheal Parent for the intervener.*

**DECISION OF ROBERT J. HERMAN, VICE-CHAIRMAN, AND BOARD MEMBER C.A. BALLENTINE; March 14, 1986**

1. This is an application brought pursuant to section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union with respect to a unit of full-time employees employed by the intervener employer at the University of Ottawa, Ottawa, Ontario.

2. The parties are agreed and the Board finds that this application satisfies the timeliness requirements of sub-section (2) of section 57. Subsection (3) of that section reads as follows:

Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

3. Based on the lists of employees filed by the intervener employer, all parties are agreed that there were 65 employees in the bargaining unit as of the application date. The applicants filed with this application a document ("the petition") purporting to evidence the desire of 49 employees in the bargaining unit that they no longer wish to be represented by the respondent. This document was filed with the Board as of December 27, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(3) of the Act. The petitions filed by the applicants contain a sufficient number of signatures to cause the Board to order a representation vote if those people are found to have voluntarily signed. In that connection the Board heard evidence as



to the circumstances concerning the origination of the petition and the manner in which each of the signatures on it was obtained.

4. The intervener employer, Domus Building Cleaning Co. Ltd., has obtained through tender, contracts to provide overnight or daytime cleaning services for several Ottawa University buildings. The employees of Domus who perform those cleaning services, at the several buildings involved, are all employees within the instant bargaining unit and are represented by the respondent union.

5. The applicant Therese Laframboise is a cleaner working from 10:30 p.m. to 7 a.m. nightly in Fauteux Hall, the home of the Faculty of Law at the University of Ottawa. When Mrs. Laframboise reports for work each evening, she reports to Salange Larocque, who provides Mrs. Laframboise with the necessary keys to obtain access to the offices which she is to clean that evening. Upon receiving the keys, the applicant proceeds to the floor in question and working largely on her own proceeds to clean that floor. Except during breaks on her shift, Mrs. Laframboise does not generally see Mrs. Larocque until she returns the keys at the end of her shift. Mrs. Larocque is herself a member of the bargaining unit, described as "cleaner" and her functions consist largely of controlling access to the keys to the building and inspecting the floors, where necessary, to ensure that a proper job has been done. Mrs. Larocque is not involved in any discipline, hiring, firing, evaluations or any other indicia of the exercise of managerial functions. Mrs. Laframboise testified that the idea for the petition was her own and Mrs. Larocque in no way influenced her or participated in that decision.

6. Within one month after the certification of the union, in April, 1984, a group of employees commenced the circulation of a petition. Legal advice was obtained and the employees were advised that they were not entitled at that time to apply to terminate the bargaining rights of the union and would have to wait until the "open period" set out in section 57 of the *Labour Relations Act* occurred. Neither applicant was involved in any way in the origination or circulation of that earlier petition.

7. Mrs. Laframboise also testified that at a union meeting held sometime in April of 1985, the employees in attendance had voted to reject a 10 an hour increase being offered by the employer. The applicant explained this rejection by the employees on two grounds. First, the applicant felt that any increase in wages to the employees would only result in the union increasing their monthly dues in a corresponding amount, with no net benefit to the employees. Second, there were pervasive rumours about the financial difficulties of the employer and a feeling that any increase in wages would result in lost jobs. The applicant was unable to identify the source of those rumours.

8. Mrs. Laframboise further testified that it was her idea to initiate the petition in the instant application, and she obtained legal assistance for this purpose. She then typed the heading on both pages of the petition and arranged for the other applicant, Yolande Pichette, to assist her with the circulation of the petition and the obtaining of the signatures thereon. Mrs. Laframboise obtained the 11 signatures of employees in the bargaining unit on her petition outside the buildings where the various employees worked, one evening prior to commencing her work shift and prior to the other employees commencing work. There was no evidence tendered with respect to two of the signatures on the petition supposedly gathered by Mrs. Laframboise and the Board accordingly gives them no weight.

9. The remaining 36 signatures were all obtained by the other applicant,

Yolande Pichette. Mrs. Pichette performs the same function, that of night cleaning service, as Mrs. Laframboise but does so for a different building at the university. Mrs. Pichette has worked for approximately 12 years for the intervener employer, on the similar 10:30 p.m. to 7 a.m. shift worked by the other applicant.

10. As in the building where Mrs. Laframboise works, Mrs. Pichette works with someone responsible for handing out the keys at the beginning of the shift, inspecting where necessary the job done by the cleaners and recovering the keys at the end of the shift. Mrs. Pichette also testified that the overall supervisor for all the employees of the bargaining unit, regardless of which building they work in, is Mr. Paul Fortin. It is his responsibility to ensure that all the buildings are properly serviced and he makes the rounds of all buildings to ensure this where necessary. Mrs. Pichette and Mr. Fortin have been good friends for the 12 years since she has been working for this employer. They regularly see each other outside working hours and virtually all the employees are aware of their friendship. When asked in cross-examination whether she would describe herself as Mr. Fortin's "girlfriend", she did not respond. Mrs. Pichette did state in cross-examination that most of the employees believe that she and Mr. Fortin talk about employment matters, including union affairs, but in fact this is not true as the two never discuss employment matters. She further testified that she had advised employees that employment matters were never so discussed between her and Mr. Fortin.

11. Mrs. Pichette obtained from Mrs. Laframboise, the other applicant, her copy of the blank petition with the heading already typed in. She decided to begin obtaining signatures on the morning in question at 6:00 a.m., approximately one hour before her shift would ordinarily end. In order to do so she needed permission to leave prior to the official end of her shift and had to obtain this permission from Mr. Fortin, her supervisor. Mrs. Pichette spoke to Mr. Fortin and asked for permission to leave an hour early, stating she needed to do so for personal reasons. It is not clear from the evidence whether she requested leave the morning in question or the prior day, however it is clear that Mr. Fortin granted her permission to leave early. The applicant indicated that in her twelve prior years at Domus she had never previously requested time off for personal reasons, other than for reasons of illness.

12. From approximately 6:00 a.m. to 6:45 a.m., Mrs. Pichette went to two different buildings where employees were working, and in the lobbies of those buildings obtained the signatures of 24 of the 36 names on her petition. Mrs. Pichette then went home for the day and that evening before she began her own work shift obtained the signatures of four more employees. During her work shift that evening the remaining signatures on her petition were obtained (with the exception noted in paragraph 8 above with respect to two of the signatures on her petition).

13. She further testified that most of the employees were aware of the rumours about the potential loss of building contracts and therefore loss of jobs, should there be any increase in wages. In cross-examination she admitted that the employees who signed could have been intimidated because of her relationship with Mr. Fortin, but felt that they would have signed in any event.

14. The final witness was Mr. Rheal Parent, the Operations Manager of the intervener employer and Paul Fortin's supervisor. In addition to explaining how the employer operated and how the tender system at the university worked, Mr. Parent more fully explained the role

and functions of the employees' supervisor, Mr. Fortin. He indicated that Mr. Fortin can be and has been involved in hiring people, and to a limited extent plays a role in any lay-offs. As lay-offs are on the basis of seniority, Mr. Fortin would not have any discretion unless individual employees wished to be on summer lay-off (presumably to be with their families) and therefore wanted to be laid off earlier than their seniority demanded. Mrs. Laframboise had testified that in her opinion Mr. Fortin did do the hiring for Domus. Mr. Parent also indicated that one or two times he had asked Mr. Fortin to attend union meetings to see what was going on.

15. The respondent concedes that any involvement by Mrs. Larocque or her counterparts (i.e. those who hand out the keys at the beginning of the shifts etc.), in the origination or circulation of the petition would not interfere with the expression of the true wishes of the employees signing such petition. Nevertheless, argues the respondent, the Board ought to refuse to act on the petition and direct a representation vote, on the grounds that the vast majority of the signatures were obtained by Mrs. Pichette, a close friend of management, and the employees signing the petition would have perceived either that management was involved in the circulation of the petition or, more likely, that their decision whether or not to sign the petition would be known or communicated to management.

16. The Board has indicated in a number of cases that a petitioner's personal relationship with a member of management and the awareness of this relationship by employees in the bargaining unit are factors to be considered in assessing whether or not the signatures expressed the true wishes of the employees who signed. See for example *Labatts Ontario Breweries*, [1985] OLRB Rep. March 433; *International Beverage Dispensers and Bartenders Union, Local 280*, [1981] OLRB Rep. June 690; *Ottawa Commercial Realities Limited*, [1983] OLRB Rep. Nov. 1877; *Jean Marc Joanisse*, [1983] OLRB Rep. Jan. 92. As the Board stated in the *Ottawa Commercial Realities Limited* case, *supra*, at paragraph 10:

Section 57(3) of the *Labour Relations Act* requires that we satisfy ourselves that the written statement of desire filed in support of a termination application represents the voluntary signification of the wishes of the employees who signed it. The approach taken to voluntariness is explained by the Board in *Grove Park Lodge*, [1980] OLRB Rep. Feb. 235 at p. 240 in the following terms:

The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 62 CLLC 16,264:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.



and in the *Peel Block Co. Ltd.* case, 63 CLLC 16,227:

It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.

See also *CCH Canadian Limited*, [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting trap for those very employees trying to express themselves. At all times a balance must be struck.

17. In the instant proceeding, the number of signatures obtained by Mrs. Laframboise would not alone be sufficient for the Board, were we satisfied with the voluntariness of those signatures, to direct that a representation vote be held. The majority of signatures was obtained by Mrs. Pichette, both a "good friend" of the supervisor of all the employees, Paul Fortin, and well-known by employees to be such a friend. Mrs. Pichette conceded that most employees felt that she and Mr. Fortin discussed employment and union matters, although indicating that such was not in fact true and that she had told employees this. Nevertheless, the evidence suggests that most employees felt that they discussed such matters, and Mrs. Pichette further conceded that the employees "could have been intimidated" by this perception into signing the petition.

18. Other factors cause the Board concern in addition to the awareness of employees signing the petition as to the relationship between Mrs. Pichette and Mr. Fortin. Most of the signatures obtained by Mrs. Pichette were obtained at or around the place where the employees

worked, in the lobbies of the buildings that they cleaned. Most of these signatures were also obtained when Mrs. Pichette would ordinarily be working (from 6:00 to 7:00 a.m.) and she needed to obtain Mr. Fortin's permission in order to leave work early. Mr. Fortin is the immediate supervisor of all employees and it is a reasonable inference that any employee would need his permission to leave early, and would therefore know that he had given such permission to Mrs. Pichette. We further infer that the employees would not have perceived Mrs. Pichette as independent and free from management influence, or at least that their expression of their wishes would not remain confidential. Mrs. Pichette's evidence that she and Mr. Fortin did not in fact discuss employment or union matters may well be true. However, the concern of the Board's inquiry is whether the employees who signed the petition, at the time they signed the petition, might have perceived management involvement or awareness of the petition and might have felt that their individual wishes would have been communicated to management. Again, Mrs. Pichette herself testified both that employees signing would have thought that she and Mr. Fortin discussed union matters, and that they might well have thereby been intimidated into signing.

19. Under these circumstances, the Board is not satisfied that the petition represents the voluntary wishes of the employees in the bargaining unit and accordingly the Board cannot give it any weight. The Board would note however that it found all witnesses credible, honest and forthright, and the evidence suggested that the employees may well have real dissatisfaction with their current bargaining agent and the representation they have been receiving. At the same time, the Board's task and inquiry is to consider whether the petition and documentary evidence as filed represents a voluntary expression of the true wishes of the employees in the bargaining unit. For the reasons given above, whatever the general dissatisfaction might be, the Board is not prepared to accept that the petition itself represented the voluntary wishes of the employees.

20. In the result, the Board is not satisfied that not less than forty-five per cent of the employees of the intervener employer in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of December 17, 1985, the terminal date fixed for this application. Accordingly, as the statutory requirement for the directing of a representation vote has not been met, this application must be dismissed.

#### **DECISION OF BOARD MEMBER W. A. CORRELL;**

1. I cannot agree with the decision of the majority in the above matter.
2. My dissent is based on:
  - i) the excessive weight given to evidence that one of the applicants is a friend of a member of management and alleged consequences that could flow from that fact.
  - ii) the lack of weight given to evidence that there were honest and valid reasons for members to seek a decertification proceeding.
  - iii) the lack of weight given to evidence that contact between members of management and the vast majority of members of the unit was infrequent to an unusual extent.

iv) the application of findings in certain other cases when the extension of the logic becomes exceptionally thin.

v) the opportunity to clear up the web of suspicions about the solidarity of the membership and to either free those members from an unwanted relationship with this particular union or to prove to management that the members have the union they want. A secret ballot could clear the air and provide the basis for harmonious relations.

3. No evidence was given, and no witnesses called to support the suspicion or obligation that “the friendship” of one applicant to the most junior member of the management group had intimidated anyone. It remains a suspicion and an allegation. The union representatives made no effort to call or subpoena other members of the bargaining unit to give evidence in this regard. Evidence was given that members knew the nature and substance of the petition, were in some cases “proud” to sign and were waiting (not avoiding in any way) for the applicants to bring the petition sheets to them.

The fact is that many members of the unit signed the other applicants petition and some members of the bargaining unit did not sign the petition. They were not apparently intimidated. The Board is responsible to act with vigilance and be scrupulous in its investigation. The Board must also act in a balanced way. The applicants in their efforts to bring forth a petition were certainly vigilant and scrupulous in avoiding any of the other pitfalls that would have certainly denied their petition. They must question, the balance of the Board’s investigation in the explanation that a person’s friendship somehow becomes the basis for the intimidation of some unit members.

4. The applicants and other members of the bargaining unit had good motivation in their opinion to seek a decertification. In evidence they said that the union was “not doing them any good”. They apparently resented the amount of dues. They particularly resented the fact that the meetings were held at places that were not close to their residences in Quebec. They also were annoyed that the meetings were held in English with an inadequate translator and that the collective agreement was in English and not translated into French until very late in the contract term. They did not like the bargain that was struck and took pains to reject an interim wage increase by secret ballot at a union meeting. It was stated by one applicant that when questions were asked of union officers they were referred to the collective agreement, written in English. As we heard in testimony many of the members of the unit do not speak English. Those facts should be given important weight as they indicate the basis of the motivation to seek a decertification.

5. The management presence at the scene of the operations was by normal business organization standards unusually small. Evidence showed that the contact of employees with the foreman was through lead hands who were members of the unit. Other employees did not see or speak to even first level management except on rare occasions. The significance of this fact is that there was very little opportunity for management to influence employee attitudes about the union. The Applicant who was friendly with the foreman outside of working hours testified that the foreman did not want to talk about work and unions. It can be concluded that management propaganda or other influence was not a factor in the decision of bargaining union members to seek decertification.



6. Finally I believe this Board should have taken a longer term view of the union/management relationship in this case. There seems to be a strong feeling against this union among the members. Their reasons were recited in testimony and not challenged. Management can hardly be expected to work seriously and sincerely with a union in that atmosphere. If the employees are sincere in their desire to decertify this union then it would be fair to give them that opportunity in a secret ballot. If on the other hand the union is right that the members were intimidated then the members should be allowed to declare their support of the union through the secret ballot. Such support would then be proof to management that any suspicions of lack of support for the union are false. In that atmosphere management could then work with the union towards developing lasting relationships.

7. It is for these reasons that I dissent from the majority decision and would have supported a decision directing a representation vote.

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**2563-85-R** Doug Chase, Applicant, v. Hotel & Restaurant Employees' & Bartenders' International Union, Local 280, Beverage Dispensers' Union, Respondent, v. 629809 Ontario Limited, carrying on business as **Dynasty Inn**, Intervener

**Petition - Termination - Evidence led as to circulation and delivery of petition to Board - No evidence about origination and preparation - Petition rejected**

**BEFORE:** *R. A. Furness*, Vice-Chairman, and Board Members *W. G. Donnelly* and *R. Wilson*.

**APPEARANCES:** *Doug Chase* for the applicant; *R. W. Kuszelewski*, *James Jackson*, *Todd Richards*, *Carrie Cronin-Hunter* and *Yvonne Leroux* for the respondent; *W. R. Herridge*, *Peter Cho* and *S. Penticost* for the intervener.

**DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER R. WILSON;** March 17, 1986

1. The names of the respondent and the intervener are hereby respectively amended to read: "Hotel & Restaurant Employees' & Bartenders' International Union, Local 280, Beverage Dispensers' Union" and "629809 Ontario Limited, carrying on business as Dynasty Inn".

2. The applicant has applied to the Board under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

3. The respondent and the intervener are parties to a collective agreement which came into effect on January 14, 1985, and which expired on January 13, 1986. This application to terminate the bargaining rights of the respondent was filed in January 6, 1986. Having regard

to the provisions of sections 57 and 61 of the Act, the Board finds that this is a timely application to terminate the bargaining rights of the respondent.

4. The respondent currently represents a bargaining unit described as follows:

All full-time and part-time employees (male and female) of the intervener employed in its liquor lounges in the following categories of employment:

tapmen, bartenders, beverage waiters and waitresses, barboys, floormen and improvers who are regularly employed by the employer.

5. The Board heard evidence from Doug Chase concerning the origination, preparation and circulation of the statement of desire which was filed in this application. Mr. Chase gave evidence that he personally saw all of the persons who signed the statement of desire sign it. He testified that with the exception of one signature which was obtained in the bar during working hours, the other signatures were obtained in the parking lot of the intervener's premises. The respondent has contested the evidence of Mr. Chase on two grounds. Firstly, Mr. Chase did not prepare the heading of the statement of desire which was filed in this application. Secondly, the respondent pointed to what it regarded as severe discrepancies in the time periods referred to by Mr. Chase in his evidence.

6. When the Board inquires into the origination, preparation and circulation of a statement of desire, it has required firsthand evidence of such origination, preparation and circulation. Failure to do so has resulted in the Board setting aside a statement of desire. In *Formosa Spring Brewery*, [1974] OLRB Rep. Oct. 696. At page 699, the Board stated:

The Board has interpreted the words origination, preparation and circulation of the petition to be encompassed by and subsumed in the words "circumstances" in terms of its requirement, for direct evidence of the subsistence of the document from the point of view of its inception to the point of its reception by the Board. This by definition would obviously include first-hand evidence detailing the physical preparation and the actual delivery of the document to the Board.

In the instant case, Mr. Chase was able to give evidence that he had delivered the document to the Board. The evidence of Mr. Chase is that he prepared the heading on a statement of desire and then, upon comparing it with a statement prepared by another employee, decided that the other statement was better. The employee who signed the statement of desire did not give evidence concerning its origination and preparation. The Board is therefore not in a position to know the circumstances under which the statement of desire which was filed with the Board was, in fact, prepared. Where there are gaps in the evidence concerning the origination, preparation and circulation of a statement of desire, the applicant has failed to establish the voluntariness of the statement of desire. See, for example, *Mac-Wood Machine Limited*, [1975] OLRB Rep. Nov. 842 and *C.I.P. Victoria Ltd.*, [1979] OLRB Rep. Nov. 1069.

7. With respect to the credibility of Mr. Chase, the respondent pointed out that the Mr. Chase began to obtain signatures on December 30th, and that he filed the signatures with the Board on January 6th. This is a period of approximately one week. However, in his testimony, Mr. Chase informed the Board that he collected the signatures over a period of two weeks and that he then visited a lawyer and was advised to prepare a subsequent document, and that he did not do so because he had obtained the signatures he did obtain on

the document which was filed with the Board. Mr. Chase stated that he did not have the time to obtain the second set of signatures as advised by the lawyer. The terminal date fixed for this application was January 30, 1986. It appears to the Board that Mr. Chase's explanation as to why he did not pursue the obtaining of signatures on a subsequent statement of desire is at variance with the evidence which indicates that Mr. Chase saw the lawyer in the middle of January. In these circumstances, he would then have had another two weeks in which to obtain the signatures. The respondent also pointed out further inaccuracies in the evidence of Mr. Chase. Mr. Chase, in his testimony, stated that he knew where to locate the Board's offices because there was a sign on the outside of the building which said "Ontario Labour Relations Board". It is, of course, untrue that there is such a sign on the building wherein the Board has its offices. In considering the evidence of Mr. Chase as a whole, we are of the opinion that there are serious problems with his credibility as a witness.

8. Having regard to the fact that the origination and preparation of the statement of desire was not in evidence before the Board, and having further regard to the fact that Mr. Chase's evidence is in certain aspects not credible evidence, we are not prepared to accept the statement of desire which has been filed in this application as representing the voluntary wishes of the employees who purportedly signed the statement of desire.

9. We are satisfied on the basis of the evidence before it that less than forty-five per cent of the employees of the intervener in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on January 30, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

10. This application is dismissed.

#### **ADDENDUM OF BOARD MEMBER W. G. DONNELLY;**

1. I do not feel that the Applicant lacked credibility but I agree that he was confused about dates and was ill informed about the terminal date. This is readily understandable in view of his lack of preparation for the hearing and the fact that he did not expect to have to be precise about dates and other circumstances surrounding the petition.

2. In fact, his confusion suggested that his testimony was genuine and that he did not receive clandestine, improper advice.

3. In not placing in evidence the provenance of the petition heading and one of its signatures the Applicant did not meet one of the Board's rules established in prior decisions. This was most unfortunate as the Petitioner was unaware that he had to honour that obligation and failure to do so has led to the petition's rejection.

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**0599-85-U** Nick Barbieri, John Cabral, John Cardoso, Mike Mihajlovic and Carmen Principato, Complainants, v. **Michele Gargaro**, Arthur E. Coia, Angela Fosco, Ugo Rossini and Labourer's International Union of North America and Local 506 of the Labourer's International Union of North America, Respondents

Evidence - Practice and Procedure - Witness - Witness referring to notes before testifying in chief - Not using notes during testimony - Order to produce notes matter of Board discretion - Production not ordered in circumstances

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members W. H. Wightman and S. O'Flynn.

**APPEARANCES:** Jeffrey S. Leon, Robert W. Staley, Nick Barbieri, John Cabral, John Cardoso, Mike Mihajlovic and Carmen Principato for the Applicants; Chris G. Paliare and Ugo Rossini for the Respondents Angela Fosco, Arthur Coia and Labourer's International Union of North America; and Paul J. Schrieder for the Respondent Michele Gargaro and Local 506 of the Labourer's International Union of North America.

#### **DECISION OF THE BOARD;** March 24, 1986

1. This is an application pursuant to section 89 of the *Labour Relations Act* alleging that the respondents have violated sections 70 and 3 of the Act.

2. At the commencement of the cross-examination of the complainant Nick Barbieri, counsel for the International asked whether he had referred to notes before giving his evidence in chief. Barbieri replied that he had. He stated that some of the notes were prepared in consultation with and for the benefit of his own lawyer in the preparation of this application and that others were notes he made following certain events. He stated that these latter notes were thrown out after he had used them to prepare notes for his counsel. Barbieri claims that he had refreshed his memory prior to giving evidence primarily by reading the detailed particulars of his application to this Board dated June 10th, 1985. During the course of his examination-in-chief, Barbieri did not refer to any notes.

3. Counsel for the respondent International sought production of all the notes, relying on the Board's decision in *McGregor Hosiery Mills*, [1976] OLRB Rep. Oct. 583. The Board ruled orally that in this case the notes ought not to be produced.

4. In *McGregor Hosiery*, the Board observed:

What is the law with respect to the weight that ought to be attached to the evidence adduced through the complainant's witnesses arising out of their failure to produce their notes for inspection by counsel? ...The results of the Board's research into the issues described herein by no means indicate a clear-cut answer. The cases are quite clear that notes referred to by a party and relied upon as evidence must be produced and filed (past recollection recorded). There is no question that in this case the complainant has not attempted to make use of the notes with a view to relying upon statements or events recorded therein. ...Nevertheless, it may be safely concluded that the notes were resorted to with a view to refreshing their memories (past recollection revived). There is no doubt that had these notes been referred to during the course of the hearing, the witnesses would be duty bound to produce the notes for

inspection by opposing counsel as an aid in cross-examination. In such cases, however, the witness must satisfy the trier of fact that the notes were prepared contemporaneously with the event before recourse may be made for the purpose of refreshing his memory. (see *Regina v. Husbands* [1974] C.R.N.S. 188 at P.190 with respect to the judicial authorities cited.)

Having reviewed the authorities, the Board is of the view that an accurate reflection of the The Law of This Province on the issue is that it is within the *discretion* of the trier of fact to direct that notes referred to by a witness prior to a hearing for the purpose of refreshing his memory be produced with a view to aiding opposing counsel to conduct his cross-examination. And where the evidence shows that these notes were relied upon *immediately prior to trial*, then the discretion held by a trier of fact to direct their production ought to be exercised. Failure to produce the said notes apparently is at the peril of the party refusing production with respect to the weight to be attached to the witness' testimony.

(emphasis added)

Clearly the question of whether or not to order production of notes used to refresh a witness's memory but not referred to by him or her during examination-in-chief is a matter for the discretion of the adjudicator. In the case of *R v. Montfils et al* [1972] 1 O.R. 11 (C.A.) the Court held that a trial judge had not exceeded his jurisdiction in ordering the production of a police officer's notes not relied upon during examination-in-chief. In *Regina v. Lewis* [1969] 3 C.C.C. 235 (B.C.S.C.), the court, citing with approval the case of *Regina v. Musterer* (1967), 61 W.W. R. 63, ruled that when a police officer had refreshed his memory from notes "5 or 10 minutes before coming into court", the trial judge ought to permit production. But the court also observed:

There is no absolute rule that in every case a witness must make any notes or documents made by him relevant to the trial available to counsel for the opposite side. Certainly if he has need in Court to refresh his recollection of past events by reference to notes made at or near the time of those events, the Magistrate will invariably order production of those notes or documents for inspection by defence counsel for the purpose of possible cross-examination.

In the case of *Regina v. Kerenko, Cohen and Stewart* (1964) 49. D.L.R. (2d) 760 (Man. C.A.), the Court upheld the decision of a trial judge who had refused to compel production of notes not referred to during examination-in-chief. The court stated:

The police officer freely admitted in cross-examination that he had referred to his notes to refresh his memory but gave no indication when he did so. At that stage defence counsel asked him to produce the notes. Crown counsel objected and after hearing argument that afternoon and early next morning the learned trial Judge ruled against the motion. His ruling was correct. The notes were not used when the constable gave his testimony and he is not bound to produce them under such circumstances. The opposite would be that every time notes in writing have been prepared, the party who prepared them would be bound to produce them if requested because, obviously, he may have made use of them at some time to refresh his memory. It is only where the witness requires his notes to refresh his memory at trial that he may be called upon to produce them, and this to test his accuracy and credibility since he was unable to give his evidence without the use of same.

This decision was followed in the case of *Regina v. Bonnycastle, ex parte Attorney-General of Saskatchewan* [1968] 3 D.L.R. (3d) 289 (Sask. Q.B.).

5. All the reported cases make clear that it is a matter for the discretion of a trier of fact to determine whether to order the production of notes used to refresh a witness's memory prior to giving evidence, but not referred to during the course of this evidence.

It is also clear that one of the factors the adjudicator is entitled to consider is how much time elapsed between referring to the notes and giving evidence. In the circumstances of this case, we are not prepared to order production of any notes. Before a proceeding is adjourned to permit a witness to recover any notes, counsel must at the very least prepare the factual basis through cross-examination for the exercise of the panel's discretion. Barbieri was not asked when he had last referred to those notes. We do not know if the time lapse was a matter of days, hours or minutes. Nor was Barbieri summonsed to produce any notes or records notwithstanding that respondent's counsel had ample time to do so.

6. Those notes Barbieri prepared to assist his counsel in the preparation of this litigation are privileged and beyond the reach of opposing counsel.

7. For all the foregoing reasons, the respondent's motion is denied.

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**0650-85-R Ontario Public Service Employees Union, Applicant, v. Daniel Dolan, Henry Wilson and The Crown in Right of Ontario, as represented by The Ministry of Natural Resources, Respondents**

**Crown Transfer - Sale of a Business - Crown contracting out operation and maintenance of provincial park - Whether transfer of undertaking or merely contract out of management function - Board comparing scope of "transfer of undertaking" with "sale of business" - Finding transfer of undertaking**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *R. J. Gallivan* and *K. V. Rogers*.

**APPEARANCES:** *Linda Rothstein*, *Mary Rowles* and *Barbara Linds* for the applicant; *Dennis W. Brown*, *Linda Kolyn*, *John R. Read* and *J. D. Quinn* for the respondents.

**DECISION OF THE BOARD;** March 21, 1986

1. In late January 1985, the Ontario Ministry of Natural Resources placed an advertisement which read, in part, as follows:

The Ministry of Natural Resources invites tenders for the operation of Fitzroy Provincial Park in 1985.

Fitzroy is a small provincial park adjacent to the village of Fitzroy Harbour on the Ottawa River, in the township of West Carleton. The tender will involve the operation and maintenance of the park which includes selling permits, providing enforcement, maintaining facilities and selling firewood. A tender package containing a prospectus and tender form is available ...

Henry Wilson drew the advertisement to the attention of his friend Daniel Dolan. They picked up a tender package, took the required steps and, as partners, submitted a tender which the



Ministry accepted in late April. This led to a formal written contract dated May 29, 1985 between them and the Minister of Natural Resources, pursuant to which they and persons they employed operated Fitzroy Provincial Park in 1985.

2. In the years prior to 1985, Fitzroy Provincial Park was operated by employees of the Ministry of Natural Resources. Those employees were covered by successive collective agreements between Her Majesty The Queen in Right of Ontario ("the Crown") and the Ontario Public Service Employees Union ("OPSEU"), which had the right to represent them under the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108. In this proceeding, OPSEU applies for a declaration that the Ministry's transaction with Messrs. Dolan and Wilson constitutes a transfer of undertaking within the meaning of the *Successor Rights (Crown Transfers) Act*, R.S.O. 1980, c.489, the relevant provisions of which are these:

1.-(1) In this Act,

- (a) "bargaining agent" means an employee organization that has representation rights under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;
- (b) "Board" means the Ontario Labour Relations Board;
- (c) "collective agreement" means an agreement in writing between the Crown or an employer and an employee organization, trade union or council of trade unions covering terms and conditions of employment;
- (d) "Crown" means Her Majesty in right of Ontario;
- (e) "employer" means an employer other than the Crown;
- (f) "transfer" means a conveyance, disposition or sale;
- (g) "Tribunal" means the Ontario Public Service Labour Relations Tribunal;
- (h) "undertaking" means a business, enterprise, institution, program, project, work or a part of any of them.

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

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(3) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has been granted representation rights under any Act and has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Board declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement, as the case requires.

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11.-(1) Where, on an application before the Board under this Act, a question arises as to whether an undertaking has been transferred from the Crown to an employer, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

If there has been a transfer of an undertaking, the precise consequences for Dolan and Wilson will depend on whether or not there was a collective agreement covering park employees in effect between OPSEU and the Crown at the time of the transfer. This was a matter of dispute at the time this application was heard, but the parties have agreed that it need not be resolved unless the Board determines that there has been a transfer of undertaking.

3. The “successor rights” consequences of a sale or transfer of a business or involving employers other than the Crown are addressed by what is now section 63 of the *Labour Relations Act*, R.S.O. 1980, c.228, the corresponding provisions of which are these:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

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(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act.

In *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733, the Board said that section 63

“... recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.”

Successor rights provisions have appeared in the *Labour Relations Act* since 1962. Their legislative history was traced in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at

paragraphs 21 to 24. In *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777, the Board found that the successor rights provisions of the *Labour Relations Act* could not apply to the transfer of an undertaking by the Crown which, as it is not an employer to which that the *Labour Relations Act* applies, could not be included in the term “employer” appearing in the first lines of each of subsections 2 and 3 of section 63 of the Act. Enacted in 1977, the *Successor Rights (Crown Transfers) Act* reversed the result in that case by applying provisions modeled on section 63 to transfers to and from the Crown, with such changes as were necessary to accommodate the fact that Crown’s labour relations are governed by a different statute administered by a different tribunal.

4. From its form and the context in which it was enacted, it is apparent that the *Successor Rights (Crown Transfers) Act* was intended to apply at least to circumstances analogous to those in which the Board has found a “sale of business” under section 63 of the *Labour Relations Act*, and that was the premise of each of the parties’ arguments in this case. Despite the different language by which “sale” and “transfer” are defined in these two statutes, the respondents acknowledged that “transfer” as defined in the *Successor Rights (Crown Transfers) Act* could encompass any transaction which could be described as a “sale” as defined by the *Labour Relations Act* and interpreted by this Board.

5. The Board’s jurisprudence on section 63 (then section 55) was reviewed at length in *Metropolitan Parking Inc.*, *supra*, where the Board made these observations:

... The Board has always construed the terms “sale” and “business” broadly, in view of the collective bargaining purpose which the concept of successorship was designed to achieve. As the Board noted in *Thorco Manufacturing Ltd.*, 65 CLLC 16,052:

“It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act*, R.S.O. 1960, c.191.) Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.”

Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms “business” or “disposition” in other statutes is of limited assistance in determining their meaning in *The Labour Relations Act*.

28. A section 55 application really involves two related questions; has there been a “sale” within the extended statutory definition of that term; and does what has been “sold”, “transferred” or “disposed of” constitute a “business” or “part of a business”. There is seldom any problem with respect to the first question. The Board has consistently followed the approach taken in *Thorco*, *supra*:

“According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, [now section 55] however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part



thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.

The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interest, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words 'any other manner of disposition' is not intended to be in any way limited or interpreted *ejusdem generis* with the words leases or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words 'and any other manner of disposition' as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers."

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29. A more difficult question is whether it is the predecessor's "business" which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfers) Act*, *The Labour Relations Act* does not contain a statutory definition of "business", and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211 the Board commented:

"The meaning to be attached to the word 'business' depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is 'the totality of the undertaking.' The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business."

While one usually thinks of a business as a profit-making economic activity, the term "business" in *The Labour Relations Act* cannot be so restricted. The Act also applies to municipalities, public libraries, universities, school boards, hospitals and other non-profit service undertakings which have employees and engage in collective bargaining. The economic activities of these entities are of an entirely different character from those of commercial enterprises, yet the definition of "business" must be broad enough to include them. Even a wholly commercial enterprise will consist of many elements, some of which will be integral, and others merely incidental, to the total undertaking. And, in the case of undertakings in the service sector, "know how", managerial systems and other intangibles are likely to be more important factors in the overall organization than particular physical plant and equipment.

31. In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner. The Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:

"In each case the decisive question is whether or not there is a continuation of the

business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or nonexistence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business."

The issue before the Board remains whether there has been a "transfer of a business"; but it is much easier to make that finding, and to conclude that the collective bargaining relationship should be continued, if there is substantial continuity of all the other elements of the predecessor's business. If the elements formerly used by "A" to carry on business are now in the hands of "B", and used for the same business purposes, it is difficult to resist the conclusion that there has been some form of transfer from "A" to "B" - albeit complex and indirect, and perhaps even by operation of the law.

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55. This approach has not only been taken by the Board in a number of cases (see, for example, *Culverhouse*, *supra*, and *Dennis Moran* [1977] OLRB Rep. Apr. 277) but also appears to have been adopted by the British Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodium Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41. In that case, the Court was considering an application for *certiorari* in respect of a decision involving what was then the successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J. characterized the question before the Board as follows:

"One must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.*" [Emphasis added]

Unless there is a continuation of the work and jobs, it would make little sense to preserve the collective agreement. Accordingly, the continuity of the work done is an important indicium of a transfer of a business.

33. There need not be a transfer of the entire business before section 55 comes into

play. The successor rights provisions may also be triggered by the transfer of “part of a business.” [See section 55(1).] This language suggests that bargaining rights continue when something considerably less than “the totality of the undertaking” has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of “the business.”...

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36. Despite the labour relations focus of the statute “the business” is not synonymous with its employees or their work. In exceptional circumstances the accumulated skills, ability, know how or business contacts of the employee may be so crucial, or irreplaceable, that their loss would mean the demise of all or part of the business as a going concern; but these cases are rare. For the most part, the continued employment of the predecessor’s employees is only one factor to be considered. The reason for this is succinctly stated by the Canada Labour Relations Board in *N.A.B.E.T. v. Radio CJYC Ltd. et al.*, (1978) 1 Can. LRBR 565:

“The purpose of the successorship provisions is to preserve bargaining rights in spite of changes in the ownership or control of an enterprise. Bargaining rights are typically granted to a trade union as bargaining agent for a unit of employees of an employer employed in certain classifications or at a certain location, or for all employees with specified exceptions. *Bargaining rights do not attach to certain specific employees as individuals.* Therefore, in defining the concept of business for the purpose of successorship, it would be incorrect to focus upon whether certain identifiable persons formerly in the employ of A are now in the employ of B. Furthermore, to focus on that question would invite employers to avoid the successorship provisions by refusing to maintain continuity of the individuals employed. A key to the protecting of bargaining rights must be whether there is continuity in the nature of the work done (i.e. in classifications or job content for which the union was certified) not in the actual persons who perform it ...

*But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as well as continuity in the nature of the work. The two go hand in hand.”* [Emphasis added]

A continuity of the work and/or the employees is significant, but it is not always sufficient, to sustain a finding of successorship. This Board adopted a similar view in *British American Bank Note Co. Ltd.*, [1979] OLRB Rep. Feb. 72 - a case which, like the present one, involved the consequences of a loss of a contract:

“There are limits, however, to the extent to which section 55 can be used to preserve collective bargaining rights. It is clear that the provisions of this section do not attach bargaining rights to the work being performed by a business but only to the business itself. While this distinction may not be easy to draw in some cases, it is essential that it be maintained since section 55 cannot be interpreted as guaranteeing to a bargaining agent an absolute right of property in the work performed by its members. Section 55 serves only to preserve bargaining rights that have become attached to a business entity so that when the business entity is transferred, either in whole or in part, those bargaining rights survive and bind the successor employer.”

The focus of section 55 is the business entity - the employer’s total economic organization - not simply the work which the employees perform.

37. The present case involves a form of subcontracting, and subcontracting



arrangements always involve the transfer of work. Work or services performed by A's employees within A's own organization are "contracted out" to B, and B uses his own managerial skills, plant, equipment and "know how" to supply to A, for a price, the product, services, facilities or components formerly produced by A's employees. A, therefore, is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand, or market, for B's product, and it is implicit in the arrangement that, thereafter, the two businesses will remain in a kind of symbiotic relationship, bound together by close economic ties. The continuity of the work, and the preservation of a close economic relationship, between the two parties is implicit in subcontracting and does not, in itself, establish a transfer of all, or part, of a business. If it is clear on the evidence, however, that B is unable to fulfill A's requirements with his existing equipment or organization, and received from A a transfer of capital, assets, equipment, managerial skills, employees or know how, then the transaction no longer looks like a simple contracting out of work. A may not be making use of B's economic organization, rather A may be transferring part of his economic organization to B (and recall that section 55 is triggered by the transfer of "part of a business") or merely permitting B to make use of his (A's) organization while retaining control and direction of the related economic activity. Of course, it is to be expected that when A phases out part of his operation there may be certain equipment or assets which are now surplus and which can be disposed of on the market. These assets may, as a matter of convenience, be purchased by B. None of these factors unequivocally demonstrates or foreclose the application of section 55 (or section 1(4).) If, however, "but for" the transfer of such assets, licences, know how or property interests from A, B would be unable to fulfill the contract, then it is easier to infer a transfer of part of A's business - albeit a part which A no longer wishes to operate itself.

6. The authority of the Minister of Natural Resources to enter into his written contract of May 29, 1985 with Dolan and Wilson (referred to therein as "the Contractor") is not in dispute. Paragraphs 1 and 2 of that contract provide:

1. This Agreement and the attached Schedule A and Appendices, documents A to F, shall form the contract between the parties.
2. The Minister, under the *Provincial Parks Act* and Regulations attached hereto as Appendix "B", grants to the Contractor the right to occupy and operate Fitzroy Provincial Park as described in Appendix "A" from the 1st day of May, 1985 until the 31st day of October in the year 1985.

Paragraph 12 of the contract gives the Contractor the option of renewing for two successive periods of two years each. Paragraph 6 of Schedule "A" provides:

(6) Delivery of Equipment

- (a) The Minister will deliver to the Contractor on May 1st, in each year of the agreement the facilities and equipment listed in Appendix D1 all of which shall be in operating condition.
- (b) The Minister and the Contractor shall agree in writing to the description and condition of the facilities and equipment listed in Appendix D1 and D2 before the Contractor assumes possession of such facilities and equipment.
- (c) The Minister will be responsible for individual repairs of items listed in Appendix D2 costing over \$500.00, where repairs are not a result of the Contractor's and/or his/her staff's negligence.
- (d) Any facilities or equipment that are replaced, shall be replaced by facilities or equipment supplied or approved by the Minister.
- (e) Upon the termination of this contract, the Contractor shall deliver to the Ministry all the

facilities and equipment listed in Appendices D1, D2 and D3 in good operating condition as when supplied to the Contractor, normal wear and tear expected [sic].

Appendices D1, D2 and D3, are titled and appear to be, respectively, an “Inventory of Park Facilities and Campground Equipment - March 31, 1983”, an “Inventory of Park Buildings” showing a total value of nearly \$360,000.00 and an “Equipment Inventory” listing office furniture, various hand and power tools, a boat and outboard motor, a tractor/front end loader, a tractor/mower and various other mowing devices with a total stated replacement value of over \$47,000.00. The Contractor is obliged by paragraph 7 of the contract to insure all of the equipment and most of the buildings. Paragraph 6 requires the Contractor to provide and pay for all electric power, telephone services, water supply fuel “and all other materials that may be required for the operation of Fitzroy Provincial Park during the term of this Agreement.” Paragraph 14 requires that the Contractor carry out equipment and plant maintenance in accordance with instructions set out in an attached Appendix “C” and that the Contractor “at his/her own expense keep and maintain the park, buildings, structures, facilities and equipment therein in a clean, sanitary and safe condition that is satisfactory to the District Manager and in accordance with the said Appendix ‘C’.”

7. Subparagraph 3(1) of the contract provides:

3.(1) The Minister agrees that the Contractor will retain all revenues generated through the sale of all permits and the operation of Fitzroy Provincial Park.

The prices which may be charged for the use of park facilities are fixed by regulations made under the *Provincial Parks Act*. Senior citizens and youth groups are entitled to use camping facilities without charge under certain circumstances. Subparagraph 3(2) of the contract provides that the Minister will pay the Contractor a specified fixed monetary “subsidy” in each year of the contract. By subparagraph 3(4) of the contract, the Minister also agrees to “reimburse” the contractor for senior citizen free camping up to a specified maximum dollar amount in each year of the contract. There is no corresponding provision for reimbursement with respect to the exercise by organized youth groups of the privilege of free camping. When his counsel asked him why that would be, Mr. Dolan said he understood this was because “the figures vary too much.” In addition to permits, the Contractor can sell firewood (at reasonable prices) and, if they have been approved by the Ministry’s Regional Director, park related souvenirs.

8. Paragraphs 10, 11 and 18 of the contract provide:

10. The Minister hereby reserves the right to purchase all stocks and supplies which are the property of the Contractor not including those provided by the Ministry and situate within the park at the original cost price or market value whichever is lesser in the event of termination of this Agreement.
11. The Contractor shall not, without the prior approval in writing of the District Manager, change the nature or extent of services provided under this Agreement and without limiting the generality of the foregoing, and the Contractor shall not, without such consent, place or install or permit to be placed or installed any fixture or equipment in the park.
18. This agreement shall not be assigned or sub-contracted without the consent of the Minister.

The terms of the contract and its incorporated Schedule and Appendices impose a great many restrictions on the use which the Contractor may make of the park and on the manner in which

the Contractor can operate the park. Examples of this have already been given. Another is that any advertising done by the Contractor must first be approved by the Ministry. Paragraphs 15 and 19 require the Contractor to fill out and remit a plethora of forms and reports on a regular basis. With respect to the Contractor's employees, paragraphs 8, 9 and 10 of Schedule "A" provide:

(8) Clothing of Contractor and Employees

- (a) All gate staff will wear similar beige shirts and dark brown pants while working in the park.
- (b) No shorts will be worn at any time and no jeans will be worn by the park wardens or gate attendants.
- (c) Only trousers or slacks which are not offensive to the public may be worn by the staff or the Contractor at any time. The Park Warden must wear the official Park Warden's uniform as per uniform policy.
- (d) All staff will wear an identification tag with the park name and the staff members name at all times while on duty in the park.

(9) Employee Conduct

- (a) The Contractor agrees at the request of the Minister, to forthwith terminate the employment, of any employees whom the Minister considers detrimental to the best interests of the park or the public using the park.
- (b) Maintain discipline among his/her employees in keeping with that required of employees of the Ministry.

(10) Special Employment Project Participation

The Contractor agrees at the request of the District Manager, to sponsor Special Employment Projects which will upgrade and improve park facilities.

All projects will be carried out to meet Ministry policy and approval.

Nevertheless, paragraphs 17 and 20 of the contract provide:

- 17. In the performance of this Agreement, the Contractor shall be an independent contractor and shall not be a servant or agent of the Minister, and the personnel of the Contractor shall be the servants of the Contractor and not the Minister. The Contractor shall employ competent and orderly employees and he/she and his/her employees shall be identified as "Concession Staff" and shall use all courtesy towards members of the public using the park.
- 20. The Minister shall be under no liability whatsoever to any person, firm or Corporation for any damage to property or injury including death to any person or persons caused by or resulting from the operations of Fitzroy Provincial Park by the Contractor, its servants or agents and the Contractor shall from time to time and at all times hereafter protect and forever save harmless and indemnify Her Majesty the Queen in Right of Ontario, Her Officers, Agents and Servants against any damage, penalty, fine, claim, judgement, cost, expense or charge suffered, assessed, imposed or incurred by Her Majesty the Queen in Right of Ontario, Her Officers, Agents and Servants or any of them arising out of the operation of Fitzroy Provincial Park or the use and occupation of any building or land on which Fitzroy Provincial Park is situate by the Contractor, its servants or agents.



9. Daniel Dolan had never run nor even worked in a provincial park before entering into this transaction with the Minister. His work experience was as a farmer and carpenter's helper. His partner Henry Wilson was a lumber mill employee who on some previous occasion had won a contract to remove garbage from the park. Wilson's wife Christine, however, had been employed as the office clerk at Fitzroy Provincial Park for a number of years. Many of the forms which the contract required Wilson and Dolan to file were the same forms Christine Wilson had worked on as a Ministry employee. Dolan and Wilson hired her to do for them the same sort of work she had done as an employee of the Ministry, and to do their books as well. Richard Kavanaugh had worked for the Ministry in this park for a number of years as park warden. Dolan and Wilson were obliged to employ someone to perform the duties and wear the Ministry-supplied uniform of a park warden, and they hired Richard Kavanaugh. James Wilson (no relation to Henry and Christine) had worked for the Ministry for a number of years doing maintenance work in the park. Dolan and Wilson hired him to do maintenance work in the park. They hired students to do other jobs. One had been employed by the Ministry in the park previously. Dolan and Wilson hired him to perform a security function. The other students they hired performed various sales and cleanup functions.

10. Counsel for the Crown argued that the transaction between the Minister and Messrs. Dolan and Wilson did not effect the transfer of an undertaking but merely "contracted out" the management of an undertaking which remained under the control of the Ministry. Implicit in this argument was the proposition that these two characterizations are mutually exclusive. He submitted that the terms and conditions imposed on the operation of the park went beyond requiring compliance with statutory and regulatory requirements and imposed Ministry policies with respect to a number of matters. The inclusion of such terms, he argued, showed that the Crown had not made a "clear transfer", "wiped its hands", or left the contractor "to do with the undertaking as he wished." This retention of interest and control was, he said, inconsistent with the notion of "transfer". Counsel for Dolan and Wilson joined in that argument, adding that the transferee of an undertaking receives something which he can sell in turn, while his clients had nothing they were entitled to transfer to anyone else.

11. Counsel for the Crown relied, at least initially, on the Board's decision in *Superior Sanitation Services Limited*, [1968] OLRB Rep. July 395. There the City of Brantford had "contracted out" the collection of garbage to Superior and, contemporaneously, sold to Superior its nine garbage trucks. The Board in that case came to the conclusion that this was not a sale of business within the meaning of a predecessor of section 63, and said:

4. ... In the circumstances of this case the corporation has not disposed of part of its business but has merely changed its method of carrying on such business by contracting *with an agent* to perform the tasks which it formerly performed by its own employees.

[emphasis added]

Counsel urged this method of analysis on us until the emphasized words were drawn to his attention. When asked whether it was his position that Dolan and Wilson were agents of the Crown, he said it was not. Counsel for Dolan and Wilson did not argue that they were agents of the Crown. We note that employees of Crown agencies are treated as Crown employees under the *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c.108.

12. Counsel for the Crown also cited *Ontario 474619 Ltd.*, [1981] OLRB Rep. Oct.

1452, in which the union representing the employees of a motel claimed that the respondent company's contract with the motel owner, Hoco Limited, to supply and manage the staff of the motel's newly renovated restaurants effected a sale of business by Hoco to the contractor. The Board described that contract at paragraph 5 of its decision:

5. ... The respondent specifically agreed to provide all necessary staff including supervisory staff. In return Hoco agreed to pay the respondent the greater of 10% of the gross liquor sales or 49% of the net profit. Even though the management fee was to be in the form of a percentage of either sales or profits, all revenues are received by Hoco and the respondent's management fees are then paid out of those revenues. Hoco is responsible for all other management decisions; it establishes hours, prices and all other policy for the two establishments. It also retains ownership and control of the physical plant, having itself decided upon and paid for all renovations. The respondent, on the other hand, is responsible only for the hiring, firing and discipline of all employees. The respondent pays and supervises the employees. Two or three of the employees who previously worked part-time for Hoco now work for the respondent. All other employees in the Motel continue to be employed by the Motel and are covered by the collective agreement with the applicant union.

After a review of other decisions, including *Superior Sanitation Services Ltd.*, *supra*, the Board offered this analysis.

22. In the instant case, the payment of the respondent of a percentage of the gross liquor sales or profits is not of itself conclusive that there has been a sale of a business or of part of a business. Provisions of that kind are common in commercial contracts, notably in leases, and do not of themselves evidence the sale of a business. In the instant case the conditioning of the revenues of the respondent on the volume of sales or profits gives it some share in the risk of profit and loss. That is an obvious incentive to better service and could be one of a number of indicia of a joint venture between the respondent and the Motor Hotel for the purposes of section 1(4) of the Act (an issue touched on further below). It does not, of itself, establish that part of a business has been transferred within the meaning of section 63 of the Act.

• • •

24. In this case there has been no transfer of any physical assets, much less the transfer in whole or in part of a "functional economic vehicle". The Hotel is the sole decision maker as to what food and drink will be bought and sold. It alone decides the hours of business and the prices to be charged. The respondent would be powerless to prevent decisions by the Hotel in these areas which could materially affect the volume of sales or profits and thereby reduce or increase its revenues. Like the management company in *Metropolitan Parking Inc.*, the respondent has acquired an obligation to perform services for compensation. It would in our view be out of keeping with business reality and go beyond the contemplation of section 63 of the Act to conclude that by contracting to supply staff to the Motor Hotel's restaurant and disco the respondent has acquired part of a business. To acquire the right to perform services in the restaurant and disco is not to acquire a going concern, in whole or in part. The segment so split off is not a going concern that can stand alone, as contrasted for example with the sale of one of a number of stores in a supermarket chain or the severance of the manufacturing and retailing arms of a previously integrated business. For the foregoing reasons the application must be dismissed.

25. It should be noted that the Board draws no conclusions with respect to what its decision would be if the same facts had been the subject of an application under section 1(4) of the Act (a refinement of the Act which did not exist at the time of the decisions in *Thorco* and *Aircraft Metal*). In light of evidence suggesting a relationship in the nature of a joint venture between the Motor Hotel and the respondent, including evidence that the president of the respondent is a director of the company that operates the Motor Hotel, the Board specifically asked counsel for the applicant whether he wished to plead section 1(4) in the alternative. He

categorically declined to do so. Since section 1(4) on its face requires some form of application to the Board, we can say nothing more in respect of that alternative.

26. The Board also makes no comment on whether as a matter of law Hoco Ltd. continues to be the employer of the persons employed in the restaurant and disco. We have concluded that there has been no transfer of a business within the meaning of section 63. It may be that there has also been no transfer of the employment relationship having regard to the numerous factors that may bear on the question of who is the true employer (cf. *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538). On the limited evidence placed before the Board by the agreement of the parties, and no argument having been directed to that issue the Board can make no determination in that regard. That issue may, of course, fall to be determined in some further application or at arbitration.

13. In *Hamilton Cargo Transit Limited*, [1983] OLRB Rep. June 887, the respondent cartage company was placed in receivership by its bankers. The bank and the receiver it had appointed then entered into agreements which are described at paragraph 3 of the Board's decision:

3. By agreement dated November 15, 1982, the Bank covenanted to sell to a third party, Cole Equipment Rental Company Limited, all of the Bank's security interest in what essentially were all of the Hamilton assets of Hamilton Cargo Transit Limited, for the price of \$350,000. The transaction was contingent upon a number of matters, including the approval of the Ontario Highway Transport Board of the transfer of the licences, and satisfactory financing arrangements. The agreement contemplated that the Bank would ultimately finance the purchase of the business by Cole Equipment, and if the Bank decided against doing so, Cole Equipment had the option of terminating the agreement. On the same date, the Receiver and the Bank entered into a further agreement with a second company, 268121 Ontario Limited, for that company to operate and manage the business of Hamilton Cargo until completion of the sale transaction contemplated by the first agreement. The purpose of this second agreement was, as the Receiver put it, "to preserve the licences and business of Hamilton Cargo, so that there would be something left to sell at the end"...

The transaction contemplated by the first-mentioned agreement had not been completed when the union representing the cartage company's employees initiated an application under section 63. That application focused on the transaction effected pursuant to the second of the two agreements. As might be expected, the terms of that agreement required that the management company's day-to-day management of the business would be subject to the supervision and control of the receiver. The agreement contained a number of restrictions on the use the management company could make of the assets of the business and the manner in which the business could be conducted. Significantly, however, the agreement provided that the revenues generated by the management company's operation of the business would belong solely to the management company and not to the debtor company or the bank. The management company was required to indemnify the receiver and the bank against operating losses and any other claim or expense incurred during the term of the agreement. The Board observed that:

10. ... it can be seen that, contrary to the situation existing in, for example, the *Price-Waterhouse* case, any profit from the current operation of the business enures to the benefit of the "Manager". The Bank's sole interest is to have the business preserved in its present form for ultimate sale as a "going concern". Consistent with that, there are certain other limitations on the authority of the Manager...

...The whole arrangement, in fact, has far more of the attributes of a "lease", than it does of a "sale" in the ordinary sense. But the definition of a "sale" under the Act is extremely broad, and in fact uses the term "lease" itself...

The very use of the word "lease" in the definition in the Act seems to leave no doubt that the transfer of assets contemplated by the section may be for a limited period only, and that



title to the assets need not pass at all. The inquiry is by no means academic, since an arrangement like the present may continue for months or even years prior to the time that an ultimate sale of the business is completed.

The Board concluded that:

11. ... as a matter of law, we find the present arrangement to fall within the definition of a "sale", as that term is used in the *Labour Relations Act*, and the applicant is entitled to the declaration that it seeks. We find that there has been a "sale" of the "business" of Hamilton Cargo to 268121 Ontario Limited, albeit on a limited-term basis, and with the restrictions necessary to preserve the business "as is". In this particular case the business of the predecessor is, subject to the fixed monthly "user" fee of \$500.00, being run solely for the profit of the "Manager". No third party is entitled to do that, under the provisions of section 63, without regard to the relationship existing between the predecessor employer and its Union...

14. The Board's decision in *Hamilton Cargo Transit Limited* illustrates that a transaction may amount to a sale or transfer of a business or undertaking which gives rise to successor rights even though the transferor does not relinquish its entire interest in the subject matter of the transaction. The respondents concede, as they must, that a lease is a form of "transfer", "conveyance" or "disposition." Both a lessee and its lessor have an interest in the subject matter of the lease. A lessor ordinarily imposes substantial restrictions on the use the lessee may make of the leased property, in order to protect its reversionary interest. Lessees are often obliged to maintain the property in accordance with defined standards. It is not at all unusual for a lease to require that the subject property not be assigned or sublet without the lessor's consent. Although the term "lease" is not usually used to describe the disposition of a business, there are dealings with businesses which have the characteristics of a lease. The transaction in *Hamilton Cargo Transit Limited*, *supra*, is one example. The Board's decisions in *Kem's Masonary*, [1964] OLRB Rep. Nov. 382, *Don Mills Bindery Inc.*, [1983] OLRB Rep. Dec. 2008 and *W. F. Stevens Reproductions Inc.*, [1984] OLRB Rep. Apr. 674 involved transactions which were or might have been described as analogous to a "lease" of a business. "Franchise" arrangements may have characteristics analogous to those of a lease. *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214 dealt with the "franchise" of part of a business formerly operated by a corporate relative of the franchisor, a transaction which, the franchisee acknowledged, constituted a sale of business despite the presence of control by the franchisor over the franchised business to an extent which led the Board to declare the parties to constitute one employer for labour relations purposes pursuant to subsection 1(4) of the *Labour Relations Act*.

15. None of the parties to this proceeding argues that, by the contract in question here, the respondents Dolan and Wilson became mere agents of an employer for whose direct employees the applicant had representation rights, as was the case in *Superior Sanitation Services Ltd.*, *supra*. The contract here is not just to manage employees, as in *Ontario 474619 Ltd.*, *supra*. While in *Ontario 474619 Ltd.*, the Board found there had been no transfer of assets of any kind, here the Crown has conveyed to Dolan and Wilson exclusive possession of, and responsibility, for buildings and equipment it values at roughly \$400,000.00. While the Crown derives a continuing benefit from the management of the park, Dolan and Wilson are operating the park for their own account. They have assumed the financial risks associated with fluctuations in attendance and changes in the cost of labour and materials. During the term of their contract with the Minister, Dolan and Wilson have been carrying on an undertaking formerly carried on by the Crown in much the same way the Crown did, using

the physical assets the Crown used, and employing people to perform jobs similar to those formerly performed by Crown employees. While the undertaking will revert to the Crown when the contract terminates, Dolan and Wilson are in a position analogous to that of a lessee or franchisee of the undertaking during the term of the contract.

16. We conclude that the transaction reflected in the contract of May 29, 1985, effected the "transfer" of an "undertaking" "from the Crown to an employer" within the meaning of section 2 of the *Successor Rights (Crown Transfers) Act*, and we so declare. We remain seized with this matter in order to deal with any other issue remaining in this application which the parties are now unable to resolve.

#### **ADDENDUM OF BOARD MEMBER R. J. GALLIVAN;**

1. In view of the broad way in which the applicable laws are drafted and the practice of the Board to give them a very liberal interpretation, I reluctantly conclude that the majority has come to a decision supportable by law and precedent. Obviously, my agreement is limited to the particular facts of this case. If the Board's decision is not that anticipated by the Ministry of Natural Resources, I would note simply that it is the government of which the Ministry is a part which is responsible both for the law which the Board applied and for the framing of the structure of the agreement it entered into with Messrs. Dolan and Wilson.

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**1046-85-R; 0974-85-U; 1121-85-U; 1414-85-U** United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, Applicant/Complainant, v. **Morewood Industries Limited**, Respondent

**Certification Where Act Contravened - Discharge for Union Activity - Unfair Labour Practice - Employees discharged during organizing campaign - Whether anti-union animus - Whether conditions for certification without vote satisfied**

**BEFORE:** *M. G. Mitchnick*, Vice-Chairman, and Board Members *M. Eayrs* and *B. L. Armstrong*.

**APPEARANCES:** *Frank Manoni* and *Mark Lefebvre* for the applicant/complainant; *Paul Kane* and *Yvan Morin* for the respondent.

**DECISION OF THE BOARD;** March 8, 1986

1. This matter consolidates an application for certification (including a request that the applicant be certified pursuant to the provisions of section 8 of the *Labour Relations Act*) with a number of complaints filed under section 89 of the Act. The section 89 complaints essentially cover the termination on July 12, 1985, of:

David Latimer,

the termination on July 22, 1985, of:

Mark Lefebvre  
 Roberta Scanlon  
 Rolland Seguin  
 Donna Seguin  
 Donna Williams  
 Kim Moran  
 Clayton Miller  
 Rheal Bourgeois  
 Mike Hebert  
 Marcel Desforges, and  
 Greg Barjarow,

and the termination on August 29, 1985, of:

Lucie Martin, and  
 Tammy Leclair.

While some of the employees terminated had substantial seniority with the respondent, a few were also probationary, and none of the employees appeared to be older than their late teens or early twenties.

2. The facts before the Board upon which the evidence of the two parties does not conflict are as follows. The operations of the respondent in the hamlet of Morewood are comprised of 3 divisions: Dutch Windows, Dutch Kitchens, and Heritage Homes. Combined, the plants in July of 1985 employed approximately 160 employees at a bargaining-unit level.



The Union filed its application, together with cards for roughly 45 per cent of the bargaining unit, on July 23, 1985.

3. On Friday, July 12, 1985, employee David Latimer was called to the office of one of the respondent's senior officers, Jim Barkey, and fired without warning. Mr. Latimer repeatedly asked to be told the reason for his firing, but was told by Mr. Barkey that he did not have to give him one, and that it was company policy not to do so. Mr. Latimer was handed a photostat of the section of the *Employment Standards Act* dealing with "pay in lieu of notice", and was given a cheque for one week's severance pay.

4. During the next week, word was passed from employee to employee that a man from the Union (Mr. Manoni) would be in the Beverage Lounge of the employees' normal drinking place, the Hotel in nearby Chrysler, in the evening of Friday July 19th, to talk to employees about the Union, and about signing up for membership. Somewhere between 15 and 25 employees attended at the Chrysler Hotel that night, including a number of the grievors. Also showing up at the Lounge that night and having a few beers were two managers of the company, Dale Murdoch and Peter Lightfoot. Other than when the two have been away together on business trips, Mr. Murdoch and Mr. Lightfoot have never gone out drinking together after work, and have never gone to the Chrysler Hotel before.

5. The next day, Monday July 22nd, a meeting took place first thing in the morning at the company office with Mr. Stephen Rosenburgh, President of the company, Mr. Murdoch, Mr. Lightfoot, and other senior management personnel. In the course of the day, 13 employees in the Windows and Heritage Homes Divisions were told to pack up their belongings and leave the premises at once, without finishing their shift, and not to come back. Two of the employees encountered by Mr. Rosenburgh in the course of leaving his office were each fired by him on the spot. In the case of most of the employees, they were escorted right off the premises by the supervisor who gave them the instruction to leave. None of the employees involved on that day were given a reason for their sudden termination, and, it would appear, all who had been employed for more than 3 months received pay in lieu of notice. And as it happens, the 13 so expelled included an exceedingly high percentage of employees who had signed cards in the Union, and, as will be discussed, *all* of the employees who played an organizing role in the campaign.

6. These are the basic facts which company counsel has to get over, quite apart from any "reverse-onus" considerations in section 89(5) of the *Labour Relations Act*. The company's evidence, mainly from Mr. Rosenburgh, is that 1985 had been a disastrous year for the company's Dutch Windows Division and that by mid-July, the realization came to him that the season was essentially over, and no basis existed for believing that the situation might improve. Sales in the Heritage Homes Division were in fact up, but Mr. Rosenburgh testified that quality and productivity problems prompted him to eliminate inferior staff in that Division as well. The company also relies heavily on the following memorandum issued by Mr. Rosenburgh on May 30, 1985, to Mr. Barkey:

Further to my memo of March 20, please be advised that *ALL* Capital Expenditures are terminated.

If you feel that certain Capital Expenditures are required please provide in writing why they are necessary and evidence of a pay back of six months or less.

With respect to staff loads, as of today, there will be no further people hired in any Division and we will not replace people who leave for the balance of 1985. Furthermore, I would like a memo by June 7 on all the people who you believe can be terminated.

Inventory levels are too high particularly in finished goods. By June 30 finished windows must be reduced by 50%.

The only exception to all of the above will be the purchasing of a used Finger Jointer for the Window Division and the equipment required to complete the kitchen conversion project.

Until further notice no Division will be allowed to purchase from outside the company any products made or offered for sale by any other Division.

Unfortunately the above is necessary in light of our lack of sales and increased expenditures in the first five months.

Please convey the above information only to the members of your staff who require it to perform their job.

The problem with that memo, however, is that it does not appear to have been operative on staffing levels at any time other than July 22nd. Mr. Rosenburgh testified that he had been elsewhere on business through parts of June and July, and that he found on reviewing the situation upon his return at the end of the week of July 15th that no action had been taken to carry out his earlier instructions. And the figures elicited by the questioning of Mr. Manoni show a substantial number of new hires in the Windows Division from the beginning of August onward. The company's explanation for the latter is that those new hires were simply replacing employees who quit, but while there was much discussion of the significance of showing documented evidence of actual manning levels in August as compared to the end of July, no evidence in that specific form was ever put forward.

7. Apart from that, the Board can see from the financial statements filed that the company was indeed well below budget in Windows and Doors in 1985. That, however, was not a new trend in July, and the company still must satisfy the Board that the reason the axe suddenly fell on *July 22nd* had nothing to do with the occurrence of the Union gathering at the Crysler Hotel on the Friday before. We have already noted Mr. Rosenburgh's evidence that, prior to that point, he had held out hope that the situation might improve. And upon reviewing the whole situation on the weekend leading into July 22nd, Mr. Rosenburgh testified that he found "no orders, too much inventory, and too many people", and that he "went berserk". That presumably referred to the Dutch Windows Division, and Mr. Rosenburgh testified that, as one would expect, he gave orders that no more overtime was to be worked in that Division as of July 22nd. In February 1986, however, some of the grievors had occasion to be back at work in the plant, and one of them found the following memo from the Plant Manager tacked on the wall of his department:

# M E M O R A N D U M

TO: All Dutch Window Employees

FROM: Dale Murdoch

SUBJECT: New Hours - July 22 - August 9, 1985

DATE: July 18, 1985

Due to a considerable increase in our order intake we must extend our original two weeks of a longer work day.

Effective Monday, July 22 our regular work hours will continue to be:

Monday, July 22	7:30 a.m.	6:00 p.m.
Tuesday, July 23	7:30 a.m.	6:00 p.m.
Wednesday, July 24	7:30 a.m.	6:00 p.m.
Thursday, July 25	7:30 a.m.	6:00 p.m.
Friday, July 26	7:30 a.m.	4:00 p.m.
 Monday, July 29	 7:30 a.m.	 6:00 p.m.
Tuesday, July 30	7:30 a.m.	6:00 p.m.
Wednesday, July 31	7:30 a.m.	6:00 p.m.
Thursday, Aug 01	7:30 a.m.	6:00 p.m.
Friday, Aug 02	7:30 a.m.	4:00 p.m.
 Monday, Aug 05	 7:30 a.m.	 6:00 p.m.
Tuesday, Aug 06	7:30 a.m.	6:00 p.m.
Wednesday, Aug 07	7:30 a.m.	6:00 p.m.
Thursday, Aug 08	7:30 a.m.	6:00 p.m.
Friday, Aug 09	7:30 a.m.	4:00 p.m.

As of Friday, August 9, 1985, we will cease extended hours in this format. Also as noted before all hours worked over regular 88 hours per pay period will be paid at the overtime rate.

Mr. Barkey in his reply evidence confirmed that these additional hours (4 a week per employee) were in fact worked as planned, at least in the first 2 of the 3 weeks posted. Mr. Barkey also confirmed that the last weekly order intake figure the company would have had before it on July 22, 1985, was 158,500, a figure which is relatively high (looking at the weekly value of orders placed in both 1984 and 1985) and which is consistent with the high figures in June that made overtime throughout the month of July necessary. All in all we find the financial information and labour statistics placed in evidence by the respondent before the Board to have been highly selective, and insufficient to establish a wholly "untainted" motivation for the sudden and dramatic action taken on the first regular working day following the Union activity in Chrysler.

8. That impression on the minds of the Board members, as undoubtedly on the minds of the employees in the plant, is substantially heightened by the *manner* in which the July 22nd terminations were carried out. While a company might well choose to pay termination pay rather than bring employees back in to work after giving notice of termination, no precedent was put forward for staff cutbacks having been put into effect in *mid-day*, apart from



isolated instances of employees being fired on the spot for cause. Mr. John Rouse, a staff employee who testified for the company, acknowledged that he had never seen anything like it in his 26 years with the company. In Heritage Homes, in particular, two employees let go were in the middle of drywalling, and the other employees who could complete that work were not even on the same shift. The foreman of the two employees was also a witness for the company, and testified that he himself was at a loss to understand why they were not permitted to at least work out their shift. And as for the escorting of the various employees right off the premises, Mr. Murdoch could only say that he had seen that done with individual employees fired previously, and that he had done it once himself when an employee refused to leave on his own following dismissal by the foreman. Mr. Murdoch testified that his concern was for the security of the company's property, but he acknowledged that none of the grievors laid off on July 22nd gave any indication that they might cause such a problem.

9. That in condensed form deals with the explanation by the company for the action it took on July 22nd. Mr. Barkey's evidence is that the individual lay-off of Mr. Latimer on July 12th was the beginning of the "downgrading", and that Mr. Latimer's area was at the front end of the production line. The inherent credibility of these various company explanations can also be matched against the credibility of the account provided by the *Union's* witnesses.

10. It is the evidence of Mr. Latimer that Mr. Lefebvre began talking to him in the week prior to July 12th about taking steps to organize the employees on behalf of the Carpenters' Union. They lacked an inside organizer for the other large Division, Heritage Homes, however, and Mr. Latimer volunteered to speak to Rheal Bourgeois about it. Mr. Latimer did in fact do that, at lunch the next day, but halfway through the conversation, he noticed an assistant foreman of the company, Mr. Ron Kuno, stretched out for a nap not ten feet away, on a pile of lumber. Mr. Latimer and Mr. Bourgeois immediately moved away.

11. Another grievor, Rolland Seguin, who impressed the Board as a particularly straightforward and guileless witness, said that there were rumours around the shop that week about a Union, and that in the course of a conversation with Mr. Kuno, Mr. Kuno commented that they had caught Mr. Latimer and Mr. Bourgeois talking about it. Mr. Kuno explained that he had overheard the two of them discussing a Union, and that he had then gone to see Mr. Rosenburgh. Mr. Kuno did not testify. Shortly thereafter, Mr. Seguin testified, his own foreman, Theo Kusters, came up to him and asked him if he had heard anyone else speaking about the Union. Mr. Kusters added that, as a lead hand, Mr. Seguin was expected to respect the company, and that if he did not tell Mr. Kusters the truth, and Mr. Kusters found out, he would fire him.

12. Mr. Seguin told Mr. Kusters that he did not know anything, but went to discuss the matter with his fiancée, another employee, Donna Williams. Mr. Seguin and Ms. Williams were in the process of becoming married and buying a house, and Ms. Williams told Mr. Seguin that if he did not do as the company had asked, *he* was the one who would be fired. It was agreed, therefore, that Ms. Williams would go to the company on Mr. Seguin's behalf. Ms. Williams testified that she accordingly went to see Mr. Barkey on July 11th, and told him that David Latimer was the employee trying to organize for the Union. Mr. Barkey thanked her and replied that "it would be taken care of". The next day Mr. Latimer, as discussed above, was called in by Mr. Barkey and fired.

13. Peter McBrearty also testified on behalf of the Union. Mr. McBrearty explained

that he had been a foreman under Mr. Murdoch until August 1985, when he was fired for missing two consecutive Fridays. Mr. McBrearty testified that he went to Mr. Rosenburgh the week of July 15th and told him that he had gotten word from an employee that a meeting had been arranged for the 19th at the Crysler Hotel to discuss the Union. Mr. McBrearty says he refused to name the employee who had been his source. He says Mr. Rosenburgh asked him if he would attend at the meeting to “disrupt” it, but that Mr. McBrearty said that it was a Friday night and he was unavailable.

14. Mr. McBrearty further testified that on the Monday morning, July 22nd, Mr. Murdoch came to him and began to explain the firings that were taking place. According to Mr. McBrearty, Mr. Murdoch stated that a number of the employees had been engaging in union activity, and that as a result certain employees were being fired from Mr. McBrearty’s department, and certain ones from other departments as well. Mr. Murdoch then discussed with Mr. McBrearty whether there were any other employees who might be involved.

15. The company called reply evidence stating that Mr. McBrearty had been fired because he had had personal financial problems, had had drinking problems, and had had “difficulty in telling the truth” with respect to overdue orders. None of this was put to Mr. McBrearty while he was on the stand. Given the circumstances of Mr. McBrearty’s parting from the company, however, we would in any event have to exercise caution in relying wholly upon the evidence of Mr. McBrearty in finding the company guilty of an unfair labour practice. But the problem for the company is that the evidence of Mr. McBrearty, and the other Union witnesses, is so much more plausible as an explanation of the sequence of events which actually took place. Specifically, the evidence tendered by the Union explains far more plausibly the sudden discharge of Mr. Latimer on July 12th, as it does the unusual appearance of Mr. Murdoch and Mr. Lightfoot at the Crysler Hotel the night the employees had arranged a gathering to discuss the Union, and the sudden and massive discharges of selected employees on the following Monday (together with the way those discharges were carried out). On balance, the Board finds the evidence clearly tipped against the company in this matter and finds that

David Latimer  
Mark Lefebvre  
Roberta Scanlon  
Rolland Seguin  
Donna Seguin  
Donna Williams  
Kim Moran  
Clayton Miller  
Rheal Bourgeois  
Mike Hebert  
Marcel Desforges, and  
Greg Barjarow

were fired for exercising their rights under the *Labour Relations Act*, in contravention of section 66 of the Act.

16. That finding having been made on the basis of the timing of the “lay-offs” above, the Board need not go on to assess the various reasons put forward by the company for selecting the employees they did. On the basis of all the evidence before us, we do not believe that the various reasons put forward, be they seniority- or performance-related, constituted the

real motivation for the terminations which took place on July 22, 1985, or, in the case of Mr. Latimer, on July 12, 1985.

17. The grievors Lucie Martin and Tammy Leclair we find to be in a different category. They were low-service employees fired on August 29th, the day after Mr. Murdoch had told them their rate of absenteeism had to improve. Both grievors were then absent from work on the 29th, and, while each testified they phoned in and left a message, we accept the evidence of Mr. Murdoch that he did not receive that message. Both grievors blamed their increased absenteeism on the friction over the Union, but both had had difficulties even prior to the onset of Union activity. While both grievors also pointed to the fact that they repeatedly refused to sign the petition against the Union, in the face of threats from the petition sponsors that "the company would know", it is not a reasonable inference from all of the evidence and material before us that the grievors were the only employees who continued to refuse to sign the petition. The complaint relating to Lucie Martin and Tammy Leclair must be dismissed.

18. The massive violations of the Act otherwise found in these proceedings, however, clearly bring into play the provisions of section 8 of the Act. That section provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

19. Each case must be judged on its own facts. Here, the violations of the Act have been established, as noted. Given the manner and number of the discharges, we have no doubt that news of the firings went through the plant, in the words of one of the *company* witnesses, "like bees". Such an immediate and massive reaction by the company would clearly convey to employees the kind of adverse consequences attendant upon any thought of bringing a Union into that operation, and that is a message that we believe would follow employees even into the polling booth. With the discharged employees reinstated, the applicant reaches the 45 per cent level required for the taking of a representation vote, but we find that a vote at this stage would not disclose the true wishes of the employees. In forming that conclusion, we are mindful as well of the amount of time that has had to be expended by the applicant, since the application for certification was filed, in the successful litigation of the unfair-labour practice complaints. As for "membership support adequate for the purposes of collective bargaining", the 45 per cent filed by the applicant is in fact high as section 8 cases go, and, in view of the early stage in the campaign at which the respondent so massively intervened, we are satisfied that the applicant's membership support filed in this case is adequate.

20. The Board accordingly exercises its discretion under section 8 of the Act to certify the applicant as exclusive bargaining agent for all employees of the respondent in the Township of Winchester save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

21. The question of remedy for the section 89 complaints is more problematic. It is clear that production is cyclical in the respondent's operations, and that work would not have



been available to the grievors on a continuous basis since their termination. In fact, we have no way of knowing what the level of employment in the plant is right now. Clearly the grievors are entitled to be reinstated when there is work for them in the plant that they would otherwise have performed, and clearly they are entitled to be compensated for the failure to provide them with such work in the past, in the period subsequent to their unlawful and premature lay-off. Apart from that, we consider it appropriate at this point to leave it to the parties to attempt to work out acceptable terms of reinstatement and compensation. The Board will remain seized of this matter in the event the parties are unable to do so.

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**2969-85-R** Canadian Union of Educational Workers, Applicant, v. **University of Ottawa**, Respondent, v. The Association of Professors of the University of Ottawa (APUO), Intervener

**Certification - Practice and Procedure - Representation Vote - Parties to pre-hearing application agreeing to exclude "all those paid from other than operating funds" - Board questioning appropriateness of exclusion - Permitting persons to cast segregated ballots pending determination of unit after vote**

**BEFORE:** *Owen V. Gray*, Vice-Chairman, and Board Members *I. M. Stamp* and *E. G. Theobald*.

**DECISION OF THE BOARD;** March 25, 1986

1. The title of this proceeding is amended to describe the respondent as "University of Ottawa."
2. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be conducted.
3. Except as to the emphasized portions, the applicant and respondent agree that the following describes a unit of employees of the respondent appropriate for collective bargaining:

All part-time academic staff, *professional counsellors and professional librarians* of the Respondent in the Regional Municipality of Ottawa-Carleton, Stormont-Dundas, Renfrew North, Prescott and Lanark Counties, save and except:

- 1) employees in bargaining units for which any trade union held bargaining rights with the Respondent as of the date of application, March 5th, 1986;
- 2) employees who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations;
- 3) all those paid from other than operating funds;

- 4) all students registered at the University of Ottawa *who do not have full responsibility for at least one course*;
- 5) *all persons who are otherwise actively involved in the practice of law including judges*;
- 6) all those engaged in the practice of medicine in the course of clinical teaching of medicine;
- 7) *all those involved in the clinical teaching of nursing and psychology*;
- 8) *all those engaged in the teaching of non-credit courses, except for those engaged in the Centre for Second Language learning.*

Clarity Note No. 1 - "all part-time academic staff" shall mean those *sessional lecturers and part-time language teachers* having full or joint full responsibility for one or more courses.

Clarity Note No. 2 - For the purpose of clarity the parties agree that the following positions are excluded by virtue of exercising managerial functions or are employed in a confidential capacity in matters relating to labour relations:

Rector, the vice-rectors, the assistant vice rectors, Secretary of the University, the deans, the administrative officers, the director of the Counselling Service, the director of the Institute for International Development and Cooperation, Chief Librarian, *Associate Librarians*, members of the Board of Governors or the Joint Committee, the Director of Institutional Planning and the University Reporting Officers, and the directors of administrative units.

4. It is not our function at this stage to determine the composition of the appropriate bargaining unit. As appears from subsection 9(4) of the *Labour Relations Act*, that determination is only made after the vote is conducted, after all interested persons have had the opportunity of a hearing before the Board. Nevertheless, as the Board observed in *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765 at paragraph 5:

... Although the appropriate bargaining unit is not determined by the Board until after a pre-hearing vote has been conducted, the likely outcome of that determination is a factor considered in striking the voting constituency or constituencies at the pre-vote stage, because a pre-hearing vote is of little use unless one can reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board.

While the scope of the parties' agreements over the description of the appropriate bargaining unit ordinarily establishes the range of likely determinations of that issue, that is not always so. The parties' agreement on a bargaining unit description does not relieve the Board of its statutory obligation to determine whether the agreed upon unit is appropriate. Parties' agreements on what would constitute an appropriate unit for the purposes of collective bargaining between them are ordinarily accorded considerable deference because they are

presumed to reflect their special knowledge of the matters relevant to that determination. Such agreements are not determinative, however, and in certain circumstances the Board may decide not to accept the parties' agreement: *Tamco Ltd.*, [1974] OLRB Rep. Nov. 764; *North York Board of Education*, [1982] OLRB Rep. June 918; *St. Joseph's Hospital, Sarnia*, [1983] OLRB Rep. June 984. Accordingly, when determining a voting constituency, the Board must be sensitive to the possibility that language agreed to by the applicant and respondent may not be accepted by the panel which makes the post-vote determination required by subsection 9(4) of the Act.

5. In this case, the parties' agreement to exclude "all those paid from other than operating funds" gives us concern. The phrase is unclear. It is not apparent what "non-operating" funds are, nor why the difference would have labour relations relevance. It is well established that a bargaining unit description that distinguishes between "hourly-rated" and "salaried" employees is not appropriate. *Duplate Canada Ltd.*, 60 CLLC 16,169. At first blush, a differentiation based on the way the employer allocates labour costs to revenue sources seems an equally fragile basis on which to define bargaining rights. (See also *Kelowna Centennial Museum*, [1977] 2 Can. LRBR 285 and *Waterloo County Roman Catholic School Board*, [1977] OLRB Rep. Dec. 856; and compare *Elizabeth Fry Society of Ottawa*, [1985] OLRB Rep. July 1026.) In the circumstances of this case, the parties should be called upon to explain their rationale for this agreed exclusion to the panel which deals with the bargaining unit issue after the vote. If that panel then concludes that an exclusion framed in this way is inappropriate, a pre-hearing representation vote conducted in a voting constituency which excluded employees "paid from other than operating funds" could not be used to determine this application if there had been any such employees at the time of the vote. To maximize the utility of the vote, employees "paid from other than operating funds" ought to be included in the voting constituency. Any ballots they cast would be segregated and not counted until the bargaining unit issue is resolved; if the parties' agreement is accepted by the panel which deals with that issue, those ballots would simply not be counted.

6. Accordingly, the Board determines that the voting constituency for the purpose of a pre-hearing representation vote in this matter shall be described as follows:

"All part-time academic staff, professional counsellors and professional librarians of the Respondent in the Regional Municipality of Ottawa-Carleton, Stormont-Dundas, Renfrew North, Prescott and Lanark Counties, save and except:

- 1) employees in bargaining units for which any trade union held bargaining rights with the Respondent as of the date of application, March 5th, 1986;
- 2) employees who exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations;
- 3) all students registered at the University of Ottawa who do not have full responsibility for at least one course;
- 4) all those engaged in the practice of medicine in the course of clinical teaching of medicine;



Clarity Note No. 1 - "all part-time academic staff" shall mean those having full or joint full responsibility for one or more courses.

Clarity Note No. 2 - For the purpose of clarity the parties agree that the following positions are excluded by virtue of exercising managerial functions or are employed in a confidential capacity in matters relating to labour relations:

Rector, the vice-rectors, the assistant vice-rectors, Secretary of the University, the deans, the administrative officers, the director of the Counselling Service, the director of the Institute for International Development and Cooperation, Chief Librarian, members of the Board of Governors or the Joint Committee, the Director of Institutional Planning and the University Reporting Officers, and the directors of administrative units.

We note that the exclusion of "all those engaged in the practice of medicine in the course of clinical teaching of medicine" mirrors an exclusion from the full time academic staff bargaining unit covered by the existing agreement between the respondent and the intervener. It appears to the Board on examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in this voting constituency were members of the trade union at the time the application was made.

7. The respondent objects that affected employees were not given sufficient notice of this application. We note that the Board supplied the respondent with 55 Notices in Form 5 in English and in French, and directed it to post them upon its premises in conspicuous places where they would be most likely to come to the attention of all employees who might be affected by the application, in accordance with section 77(1) of the Board's Rules of Procedure. In its submissions on this issue, the respondent appears to be saying that the places where it posted those notices are not places where they were most likely to come to the attention of part-time academic staff affected by this application. The respondent's written submissions do not suggest what the Board's response to them ought to be. Our function at this stage is merely to determine whether a pre-hearing representation vote ought to be conducted and, if so, how. Affected employees would be given notice of any such vote and, following the vote, of their opportunity to make submissions with respect to the application. Apart altogether from the respondent's doubtful status to complain about the adequacy of the notice to employees (see *Cunningham Drug Stores Ltd. v. Labour Relations Board*, [1973] S.C.R. 256 at pages 264-265; *Canada Labour Relations Board v. Transair Limited et al* [1976] S.C.R. 722 at pages 743-745; and, *Federated Building Maintenance Co. Ltd.* [1979] OLRB Rep. Oct. 974 at paragraphs 10 and 11), we see no reason to deal with its submissions on this point at this stage. The adequacy of notice is a matter which can be dealt with after a vote is conducted.

8. The Board directs that a representation vote be conducted among employees in the voting constituency defined in paragraph 6 hereof. All employees of the respondent in the voting constituency on March 18, 1986, who do not voluntarily terminate their employment or who are not discharged for cause between that date and the date the vote is taken will be eligible to vote. If a voter falls within any of the following categories, his or her ballot shall be segregated and shall not be counted pending further order of the Board.

- 1) professional counsellors and professional librarians;
- 2) students registered at the University of Ottawa;
- 3) all persons who are otherwise actively involved in the practice of law including judges;
- 4) all those involved in the clinical teaching of nursing and psychology;
- 5) all those engaged in the teaching of non-credit courses, except for those engaged in the Centre for Second Language learning;
- 6) associate librarians;
- 7) all those paid from other than operating funds;
- 8) persons whose eligibility is the subject of a challenge noted in Appendix "B" to this decision.

9. The respondent submits that the vote ought to be conducted by mail, and offers to provide the Board with addressed labels for all people eligible to vote. The applicant submits that the Board's ordinary vote procedure ought to be followed, but asks for an opportunity to review in advance any mailing list supplied by the respondent for the purpose of a mailed ballot. The respondent objects to the applicant's seeing its mailing labels. Balancing the special circumstances which underlie the respondent's request against the inherent difficulties and frailties of a mailed ballot vote, we are of the view that the Board's usual vote procedure ought to be followed in this case, but that the Board's usual posted Notices of Taking of Vote should be supplemented by mailing photo-reduced copies of the French and English versions thereof to the name and address set out on each address label which the Board receives from *either* party by 4:30 p.m., Wednesday, March 26, 1986. The Registrar shall ensure that each party is immediately advised by telephone and telex or telegram of the Board's direction that the labels offered by the respondent, and any labels the applicant wishes to file, are to be delivered to the Board by the aforesaid date and time. Neither party will be given any information about the other's labels without further order of the Board.

10. The respondent submits that if the Board adopts the ordinary voting process, polls should be open for 3 consecutive days during the hours of 10:00 a.m. to 8:00 p.m. at 5 locations on its Ottawa campus and at its offices in Cornwall and Pembroke. Having regard to the numbers involved, it appears to us possible to conduct an adequate vote if one poll is open at a single location on the respondent's Ottawa campus for extended hours on each of two consecutive days, together with limited duration one timepolls at the Cornwall and Pembroke locations specified by the respondent.

11. Subject to the observations made in paragraphs 9 and 10 of this decision, all matters concerning the conduct of the representation vote are referred to the Registrar pursuant to section 68 of the Board's Rules of Practice.

12. The respondent is directed to post a copy of this decision beside each copy of the Notice of Taking of Vote which is posted on its premises.

[Appendices "A" and "B" omitted: Editor]

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**0133-85-U Robertson-Whitehouse, Complainant, v. United Steelworkers of America and Local 4970 and George Teal and Jack Zannata, Respondents**

**Duty to Bargain in Good Faith - Unfair Labour Practice - Employer consenting to maintain OHIP and insurance coverage during strike upon union's agreement to reimburse costs of premiums - Failure to reimburse not raised at bargaining which led to settlement of strike and collective agreement - Whether bargaining duty contravened**

**BEFORE:** Judge R. S. Abella, Chairman, and Board Members I. Stamp and L. Lenkinski.

**APPEARANCES:** W. J. Hanson and A. D. Fraser for the complainant; and Brian Shell and George Teal for the respondents.

**DECISION OF THE BOARD;** March 7, 1986

1. This is a complaint filed pursuant to section 89 of the *Labour Relations Act* alleging that the respondents violated section 15 of the Act.
2. The complainant company and respondent union were parties to a collective agreement whose term was from September 28, 1982 to September 27, 1984. The union gave notice to bargain on or about June 28, 1984. The Minister of Labour notified the parties of his decision not to appoint a Board of Conciliation by letter dated September 11, 1984. At a meeting between the parties on September 19, 1984, it was agreed that no strike or lockout would take place until after the next scheduled mediation meeting on September 30, 1984. Notwithstanding this agreement, a strike was called and began on September 28, 1984.
3. At the conclusion of the unsuccessful September 30th mediation session, the company, through its chief spokesman and personnel manager, Alan Fraser, advised the union that henceforth the company would stop paying benefits for employees. George Teal, then a staff representative for the United Steelworkers of America and chief union negotiator, asked Fraser to let him know what the costs of the benefits were so that the union could decide what costs it would assume during the strike.
4. After this meeting, a bulletin was circulated by the Local on October 3rd or 4th to all members of Local 4970 advising them that a meeting had taken place on September 30th "to try to resolve all outstanding issues and to arrive at a settlement that would be acceptable to the membership". The bulletin also stated that "We were...informed that effective September 30th the benefit package would cease, and coverage would have to be taken by the union or an individual. The union is now considering what coverage to maintain".
5. On October 1st, 1984, Fraser called Teal to tell him the respective costs of the



various benefit plans and to confirm that the company was prepared to keep up whatever payments the union wished. He advised Teal that the approximate cost for insurance and OHIP was \$8000. Fraser agreed to send the bill to Teal when the invoices arrived.

6. Fraser then wrote on October 3rd to the insurance company, advised them of the strike, and informed them that the company had agreed to maintain life insurance and medical benefits under the insurance policy and that the union had agreed to reimburse the company for the cost of premiums during the strike. On October 9th, Fraser wrote to OHIP advising them that the employees were on strike as of September 28, 1984 and that "The union has agreed to reimburse the company for the cost of premiums during the period of work stoppage.". It is not clear from the evidence whether the union received copies of these letters.

7. Fraser wrote to Teal on October 22nd enclosing premium payment notices for insurance and OHIP benefits totalling \$8206.25. The letter concluded "Please issue a cheque, in the above amount, payable to Robertson-Whitehouse, as soon as possible". Fraser never got a response to this letter from Teal or the union.

8. When Teal received this letter from Fraser, he called Jack Zannata, the president of the Local, advised him of the contents, and suggested they review it. It is Teal's evidence that the Local decided to pay the company the \$2107.50 owing on the insurance premiums. Before the strike ended, Fraser called Teal about the outstanding bill. Teal in turn called the Local to inquire why the money had not been paid. He was told that the Local was going to try to get the company to assume the costs of the insurance but that if it refused, the Local would pay. The insurance premium was in fact not paid by the Local until June 11, 1985.

9. On November 5, 1984, the parties met and settled the strike. A memorandum of settlement dated November 6, 1984, was signed by the parties. No reference to the outstanding bills was made in the memorandum and both parties in their evidence agreed that the issue was not raised in bargaining. Fraser assumed the matter had been agreed upon, having enjoyed an excellent relationship with Teal, and stated that in any event, ending the strike was uppermost in their minds. He stated that the payment of the premiums was "not a high priority item for the company so they didn't want to raise it" during collective bargaining. John Melvin Hunt, the company's comptroller and a member of its negotiating team said in his evidence that not only was the issue not a major consideration, it was "not even considered".

10. The agreement was ratified by the membership on November 7th. On November 9th, after learning from Zannata that the Local had no intention of paying for the benefits and that Teal had no right to make the deal he purported to make, Fraser wrote to Teal advising him that his cheque covering the October premiums had not yet been received. He further stated: "To avoid possible difficulties in maintaining employee coverage under these benefits, we will pay the said premium and recover the amount from the monthly dues deductions".

11. In response, the Local filed a grievance alleging a violation of the collective agreement resulting from the company's withholding of union dues for the months of November, 1984, December 1984 and January, 1985 in the total amount of \$8206.25. The grievance was dismissed by the sole arbitrator on April 4th, 1985 because the union had proved neither that the dues were deducted nor that the dues were not forwarded. Notwithstanding this decision, the company remitted to the union all outstanding dues.

12. Teal's evidence is that in a conversation with Fraser before the strike was settled,

he told him the union would pay only for life insurance. He denies ever promising to pay for OHIP premiums. His practice as a negotiator is not to ask for this coverage because under the OHIP scheme, the union can seek premium assistance during the second month of a strike. The strike at Robertson-Whitehouse being only one month old, there was no need to arrange for OHIP coverage. Teal admits that he never advised Fraser of the Local's decision not to pay for OHIP premiums even after Fraser sent him the letter of October 22nd or the invoices on November 9th.

13. We do not find Teal's evidence on the OHIP issue credible. The day after the September 30th meeting, Fraser advised Teal by telephone of seven areas of benefit coverage and their costs, including drug and dental plans. After this conversation, the company agreed to maintain only life insurance and OHIP. It strikes us as unlikely that the company would undertake the maintenance of only these two benefit plans without authorization from the union. There is no reason why the company would arbitrarily undertake these two major payments and no others without express authorization from the union. Moreover, at no time while the company was still in a position to refuse to make these payments for the union, did Teal tell Fraser not to make them. The conclusion is inescapable that Teal had agreed to reimburse the company for both OHIP and life insurance but was thwarted in his agreement by the refusal of Zannata and the Local executive to comply with the terms of Teal's undertaking.

14. The legal issue before us, having found that Teal agreed with Fraser to reimburse the company for OHIP and life insurance premiums, is whether this violates the duty in Section 15 of the Act to bargain in good faith.

15. Section 15 states:

"The parties shall meet...and they shall bargain in good faith and make every reasonable effort to make a collective agreement."

It is clear from previous Board jurisprudence that this includes the duty to make reasonable disclosure of issues affecting the bargaining process *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 and precludes misrepresentation *Inglis Limited*, [1977] OLRB Rep. March 128.

16. In this case, the parties entered into a memorandum of settlement, the union ratified it, and no one is arguing that the binding collective agreement that resulted was obtained by fraud or misrepresentation. Rather, it is the company's position that the union, in agreeing through one of its agents to reimburse the company for the payment of benefit premiums, acted in bad faith in a collective bargaining context. The company acknowledges that the agreement was collateral to the collective bargaining process, was not reduced to writing, and was not an issue on the bargaining table, but maintains that it was nonetheless violative of the duty to bargain in good faith.

17. Although the union's behaviour could undoubtedly be seen ultimately to be unproductive of the most harmonious possible labour relations relationship with the employer, this in itself does not render it a violation of Section 15. That there was a disagreement over benefits is undisputed. But it was not a misrepresentation which inhibited the collective bargaining process. Nor was there detrimental reliance of the kind that could be characterized

as fraudulently inducing one party to enter into the collective agreement. The issue was not considered important enough by either side even to be on the table, notwithstanding that by November 5th the company was aware that there might well be some difficulty in collecting payment from the union. Both sides wanted an end to the strike, both wanted a collective agreement, and both were aware that the matter of repayment was far from settled. It was open to either of them to raise it, but neither, for their own reasons, chose to.

18. If the company wished to resolve the outstanding issue of benefit payments, it was open to the company to raise it during bargaining, clarify the situation in the presence of the representatives for both sides, and attempt to obtain agreement on appropriate language for inclusion in the collective agreement. There was clearly no agreement over benefits to which anyone in the union other than Teal felt bound. It is precisely to avoid this type of confusion and potential mischief that written binding collective agreements exist. It is unfortunate that the company now finds itself penalized for its informal willingness to cooperate with a union representative, and the consequences for the union in the negotiation of the next collective agreement may well be stricter scrutiny, but the company has unwittingly found itself in a situation beyond the ambit of section 15.

19. For all the foregoing reasons, this complaint is dismissed.

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**0471-85-R Ontario Public School Teachers' Federation, Applicant, v. Scarborough Board of Education, Respondent**

**Certification - Practice and Procedure - Representation Vote - Individuals in voting constituency widely dispersed - Important that union able to communicate with voters - Employer directed to provide names and addresses to union and Board - York Board of Education principles followed**

*[This decision was inadvertently omitted from the August, 1985 issue: Editor]*

**BEFORE:** Harry Freedman, Vice-Chairman, and Board Members I. M. Stamp and S. O'Flynn.

**APPEARANCES:** C. M. Mitchell, D. Lennox and Bill Fisher for the applicant; John W. Woon, Mark Strang, C. R. Mason and R. A. Mitchell for the respondent.

**DECISION OF THE BOARD;** August 20, 1985

1. The hearing in this matter arose as a result of a request by the applicant for reconsideration of the Board's decision of July 16, 1985. For reasons given at the hearing of this matter, the Board dismissed the applicant's request for reconsideration, but dealt with the request for disclosure of names and addresses of the persons in the voting constituency on its merits.

2. Following the submissions of the parties on that point, the Board recessed and returned to deliver the following oral ruling:



### ORAL RULING

The applicant requests the Board to direct the respondent to provide it with the names and addresses of the persons that may come within the voting constituency described by the Board in its decision of July 4, 1985. For reasons given earlier in this hearing, the Board treated the applicant's request as a fresh request made at a time prior to the Board commencing its mailed ballot voting procedure in this matter.

The essence of the applicant's submission is that the voting constituency is comprised of such widely dispersed individuals, it is effectively precluded from communicating with those persons during the campaign period prior to the vote and relies on the *York Board of Education* decision on this point, [1985] OLRB Rep. May 767.

The respondent resists the applicant's request. It submitted that the portion of the *York Board of Education* decision directing the employer to disclose the names and addresses of the affected employees was *obiter*, and is distinguishable on a number of grounds. It further submitted that the applicant could communicate through the media and through its own members who are employed in the respondent's schools. It also submitted that such an order would invite unions to make applications for the purpose of obtaining such lists which would be an abuse of process and further would encourage the respondent to communicate with its employees when it might otherwise not be disposed to do so.

We are satisfied that any concerns about ulterior motives for filing certification applications can be dealt with by the Board through its power to impose a bar on an unsuccessful applicant.

As for the other concerns expressed by the respondent, we are persuaded that the opportunity to communicate with employees is important in permitting employees to properly assess the consequences of choosing to vote for or against representation by the applicant. The composition of the voting constituency in this case is such that we are satisfied, for the reasons expressed by the Board in Part IX of the *York Board of Education* decision, that the information requested is necessary to adequately communicate with employees.

The respondent may choose to communicate or not with its employees. It has the means to do so; the choice of communication belongs to it. In our opinion, that same choice ought to be afforded to the applicant in these types of cases.

Therefore, the Board directs the respondent to file one copy of the names and addresses of the employees in the voting constituency with the Board and with the applicant forthwith.

The Board also observes that the applicant made it clear to the Board that it will be taking issue with the principles pronounced by the Board in the *York Board of Education* case with respect to determining the composition of the voting constituency.

3. This panel of the Board is not seized with this matter.
4. This matter is referred to the Registrar.

**2680-85-U Victor St. Pierre, Complainant, v. The United Steelworkers of America AFL-CIO-CLC, 5417, Respondent**

**Constitutional Law - Employee of uranium mine filing complaint - Operation within federal jurisdiction - Complaint dismissed**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *J. P. Wilson* and *H. Kobryn*.

**DECISION OF THE BOARD;** March 27, 1986

1. This is a complaint under section 89 of the *Labour Relations Act* of Ontario which alleges that the respondent trade union has violated sections 68, 69 and 70 of the Act. The complainant is employed by Rio Algom Limited at Elliot Lake. His complaint relates to his employment with Rio Algom Limited, and the manner in which the respondent trade union has represented him in his employment with Rio Algom Limited.

2. It is our understanding that Rio Algom Limited's operations at Elliot Lake involve the mining of uranium. In *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board* (1956), 5 D.L.R. (2d) 342, 56 CLLC 15,293 (Ont. H.C.) it was held that the mining and concentrating of uranium ore falls within federal jurisdiction. In the result, the Court quashed certain decisions of this Board purporting to relate to employees engaged in the mining and concentrating of uranium ore. The reasoning of the *Pronto Uranium Mines Ltd.* case appears to be applicable to these proceedings. Accordingly, we are led to conclude that this Board lacks jurisdiction to deal with the subject matter of the instant complaint.

3. Section 71 of the Board's Rules of Procedure provides as follows:

71.-(1) Where an application or complaint does not, in the opinion of the Board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

- (a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;
- (b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or
- (c) confirm its decision dismissing the application or complaint.

4. In that this Board appears to lack jurisdiction to deal with the subject matter of this complaint, the Board hereby dismisses the complaint pursuant to section 71(1) of the Rules of Procedure.

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**1406-85-R United Steelworkers of America, Applicant, v. Trim Trends Canada Limited, Respondent, v. Group of Employees, Objectors**

**Certification - Petition - Two prominent members of public speaking out against organizing of company - Giving perception of link with employer - Statements about loss of jobs resulting from unionization - Statements of third-parties initiating petition in circumstances**

**BEFORE:** *Ian C. Springate*, Alternate Chairman, and Board Members *R. J. Gallivan* and *W. F. Rutherford*.

**APPEARANCES:** *Keith Oleksiuk*, *Everett Roberts* and *Steve Banks* for the applicant; *Walter Thornton* and *S. W. Coe* for the respondent; *David Zimmer* and *Suzanne Hodgkinson* for the objectors.

**DECISION OF IAN C. SPRINGATE, ALTERNATE CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; March 20, 1986**

1. This is an application for certification.

2. This matter originally came before a differently constituted panel of the Board. That panel of the Board issued a decision on October 3, 1985 which stated, in part, as follows:

3. The parties were able to agree on the bargaining unit description. Having regard to that agreement the Board finds that all employees of the respondent in the Village of Dundalk, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The applicant has filed membership evidence in respect of 135 individuals of the 232 employees in the bargaining unit. The membership cards submitted bear original signatures, the receipts have been countersigned, the dates are in order, they indicate the payment and receipt of \$1.00 and have been gathered by more than one collector. A Form 9 has been filed



attesting to the authenticity of the membership evidence. Accordingly, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 17, 1985, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. The Board also notes that statements of desire were filed with the Board containing, in total, the names of some 24 individuals who had previously signed membership cards in the applicant. Moreover, there were filed with the Board some seven revocations or reaffirmations of union support whose names coincided with the names of employees who also signed statements of desire in opposition to the union. However, at this point, the Board need not deal further with the revocations as there is insufficient overlap between the statements of desire in opposition to the union and the reaffirmations of support. That is, even if the revocations were proved voluntary, the Board would proceed with an inquiry into the voluntariness of the statements of desire. The statements of desire, on the other hand, are relevant as, if proven voluntary, they would raise sufficient doubt concerning the continued support for certification of the applicant by a sufficient number of employees who also signed membership cards, that the Board would generally exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time.

3. The statements of desire in opposition to the application bear the signatures of 118 of the 232 employees in the bargaining unit, including 24 employees who had previously signed membership cards in the applicant trade union. As the Board indicated in its decision of October 3, 1985, the Board has a long-established practice of accepting such statements of desire and exercising its discretion to order a representation vote if, as in this case, the statements contain the signatures of a sufficient number of persons who have previously signed union membership cards such as to raise a doubt as to whether more than 55 per cent of the employees in the bargaining unit continue to support the union's certification.

4. Before it will exercise its discretion to direct the taking of a representation vote on the basis of a statement of desire, however, the Board must be satisfied that when union members signed a statement indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer and result in reprisals. The Board discussed this in the *Radio Shack* case, [1978] OLRB Rep. Nov. 1043 as follows:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document

such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

5. The respondent operates an automotive parts production plant in the Village of Dundalk, which is located near the southern limits of Grey County. The Village has a population of approximately 1,400. The surrounding countryside and smaller neighbouring communities have approximately 1,600 additional people. The respondent moved its operations to Dundalk from Ajax in 1968. It is the largest employer in the area.

6. The respondent company moved to Dundalk after being contacted by a development committee established by the Village. The committee had been established in response to local concerns relating to the lack of industrial development in the area. This committee was able to convince the respondent company to locate in Dundalk. One of the incentives offered to the company was the availability of some inexpensive land. Another incentive was an interest-free loan of \$100,000, to be repaid by the company over a ten-year period. Two local service groups each contributed \$5,000 towards the amount of the loan. The remaining \$90,000 was raised by way of \$500 and \$1,000 contributions by individual citizens. The company repaid the entire \$100,000 loan over a ten-year period. The company made the repayments on a monthly basis to a group of prominent local citizens who acted as trustees of the money. The trustees, in turn, repaid the money to those who had lent it on an annual basis. Although the company paid no interest on the loan, because of the time lapse between when the trustees received payments from the company and when the amounts involved were repaid to individual lenders, a certain amount of interest accrued on the money held by the trustees. As will be detailed below, the interest received by the trustees was used to help cover the costs associated with presenting the statements of desire to the Board.

7. Two prominent local citizens involved in the events which led to the company locating in Dundalk were Mr. Gordon Aitchison and Mr. Jack Seeley. Mr. Aitchison has been an insurance broker in the Village for some 28 years. At the time of the establishment of the development committee, Mr. Aitchison was a member of the Village Council. He was not at the time a member of the committee. Mr. Aitchison's only involvement with the move of the company to Dundalk appears to have been his contribution of \$1,000 as part of the \$100,000 loan made to the company. From 1967 to 1980, Mr. Aitchison served as Reeve of the Village, and thus was the Reeve when the company commenced operations in 1968. At the time of the events surrounding the origination of the statements of desire, Mr. Aitchison was chairman of an industrial committee. It appears that this committee was either the same body as the development committee referred to above, or a new body with a similar purpose.

8. Mr. Seeley is now retired. Prior to his retirement he operated a local school bus business. In the early 1960's Mr. Seeley served as the Reeve of Dundalk. Over the years he

has also been actively involved in a number of community activities and received various awards, including being named "Man of the Year". Mr. Seeley testified that everyone in Dundalk likely knows who he is. Mr. Seeley was a member of the development committee at the time the arrangements were made for the respondent company to move to Dundalk. He was also one of the five citizens who served as trustees of the fund through which people were repaid for advancing money to the company.

9. The applicant trade union commenced its organizing campaign among the respondent company's employees early in 1985. In March of 1985 Mr. Sidney Coe, the company's plant manager, sent letters to the homes of employees in which he asked that employees think carefully before making up their minds with respect to union representation. The tone of the letter would have suggested to employees that the company preferred to remain union free. However, it is not alleged by the union that the sending of the letter, or its contents, were improper.

10. At some point in time, apparently near the beginning of the union's organizing campaign, a letter to the editor appeared in the local newspaper, the Dundalk Herald. The letter, which was not put into evidence, was written by the husband of one of the company's employees. The letter expressed opposition to employees joining the trade union. The trade union raises no concerns with respect to this letter. The letter in question was responded to in a letter to the editor written by Mr. David Patterson, the Director of District 6 of the United Steelworkers. Mr. Patterson's letter was published in the newspaper on or about July 22, 1985.

11. On or about May 22, 1985 a photo and article appeared in the local newspaper relating to the company. The article centred around the formal presentation of a "Q1 Preferred Quality Award" plaque to the company by the Ford Automotive Company for having implemented an effective quality assurance program. The plaque in question had actually been hanging at the company's facilities in Dundalk for over a year. The article recounted how the company came to locate in Dundalk, making a specific reference to "the fine work of an industrial committee headed up by Jack Seeley". In the same edition of the newspaper was a letter to the editor from Mr. Aitchison. The letter read as follows:

#### **Letter to the Editor**

The rumours about the employees of Trim Trends talking with United Steel Workers of America with a view to forming a Union are very upsetting news.

Back in 1966, Dundalk Council formed a Planning and Development Committee to try and locate Industry here, after a lot of advertising and foot work, a contact was made with Trim Trends who were thinking of re-locating from Ajax where they seemed to be having Union problems.

An agreement was arrived at and the local Community raised \$100,000 interest-free money to assist in having the plant located here.

In 1968 the new industry opened their doors here with a plant of 22,000 square feet and about 80 employees.

Trim Trends have been excellent corporate partners, and paid their loan back on schedule, and since that time have expanded to 80,000 square feet, with 300 employees. They now leave an annual payroll of approximately \$3,000,000 in the area.

The nature of Trim Trends contracts with the major auto makers does not allow for failure to deliver on time due to strikes or walkouts.



I sincerely hope these people who will be voting on this will hesitate and think this matter over very carefully, as I am led to believe a Union vote would cause management to farm out more jobs in other areas, with an actual loss of jobs here, which Dundalk and area can ill afford.

Our present industrial committee is working hard now trying to locate more industry here. We have the serviced land available, and one of our selling points has been non-union.

We hope it continues to be so.

Gordon Aitchison  
Chairman  
Industrial Committee

12. Mr. Aitchison testified that he had heard that a union was organizing the employees of the respondent company through casual conversations, and decided on his own initiative to write his letter. According to Mr. Aitchison, he did not discuss the union or his letter with the management of the company, and his statements relating to the company's contracts and the likely result of unionization were based simply on assumptions that he had made. We accept Mr. Aitchison's testimony in this regard. Nevertheless we believe the wording of Mr. Aitchison's letter would have suggested to employees that he was in possession of information from the company. He referred to the contents of the contracts between the company and the major auto makers without indicating that he was only assuming what the contracts stated. In addition his statement that "I am led to believe a union vote would cause management to farm out more jobs", suggests that he was in receipt of inside information as to how management would respond to the unionization of its work force. Notwithstanding the fact that Mr. Aitchison's letter would reasonably have left the impression that he had information from management, the company took no steps to make it clear that such was not the case, and that Mr. Aitchison's views did not reflect its position.

13. Mr. Seeley also testified that he did not discuss matters relating to the union campaign with company officials. We are unable to accept his testimony. Mr. Seeley testified that his first connection with the union organizing campaign occurred in August of 1985 when five employees came to his house to discuss the union. At the hearing before the Board, Mr. Seeley denied having earlier spoken to the company about matters in the plant. However, two of the employees who met with Mr. Seeley in August testified that at that meeting Mr. Seeley stated that he had been talking with Mr. Sidney Coe, the plant manager. One of the employees, Mrs. Tracy Dillman, testified that Mr. Seeley stated that he had been talking with Sid and knew both about communication problems at the plant and the suggestion box. The other employee, Mrs. Carol Anne Ryder, testified that Mr. Seeley said that he had had an interview with Mr. Coe and knew there was a communications problem between employees and management.

14. On or about June 19, 1985 the following letter to the editor from Mr. Seeley appeared in the local newspaper:

**Letter to the Editor**

**Directed to the Employees of Trim Trends**

Approximately twenty years ago, several citizens of Dundalk and surrounding area became aware that because of the changing agricultural picture and lack of an industrial payroll, the

economic future of our community was growing increasingly bleak. In order to meet this challenge, a group of concerned residents organized the Dundalk Development Board, whose chief purpose was to attract an industry to locate in Dundalk. As a member of the original Board, I feel that I must express my concern over recent developments which I perceive to be a real threat to the continuing prosperity of the Dundalk community.

In order to create a climate necessary to encourage an industry to locate in our small village, in 1967, approximately one hundred area families each loaned a sum of one thousand dollars interest free for ten years to create a fund which could provide adequate capital to assist in the construction of a suitable factory. Had Trim Trends not met with financial success, this investment would have been forfeited, many of the original investors borrowed the required one thousand dollars, and risked its loss, because of the great need which was felt to provide suitable employment for residents of the area who would otherwise remain unemployed or be forced to move to an urban district.

The second way in which the location of Dundalk was made a desirable possibility for Trim Trends was that the Board promised to provide a work force of responsible, capable people, who would be willing to do an honest day's work for an honest day's pay. We do not apologize for this promise.

We also convinced the management of Trim Trends that the residents of this area were capable of speaking for themselves and making their own decisions, and that they were not the type of people who would readily accept union rule. Because of the obvious enthusiasm of the Dundalk community to develop a viable solution to its own economic problems, and with the availability of a suitable work force, Trim Trends decided to build in Dundalk rather than in one of the three other locations under consideration at that time.

The factory was opened, a solid group of excellent employees were hired, the area payroll expanded and the economic needs of the community were met. Because their work appeared to be completed the Board members dissolved their committee. We were content that our countless hours of negotiating and fund-raising efforts had resulted in an improved standard of living for area residents, and that once again the Dundalk community had a sound economic future.

Unfortunately, it would now appear that as the number of employees increased and factory operations expanded over the years, insufficient priority was given to the urgent need of maintaining good relations between management and employees. Thus we now understand that the implementation of a union at Trim Trends in the near future is a distinct possibility.

We cannot expect that the younger employees in the plant will remember the stark economic reality of the situation eighteen years ago. However, it is my sincere belief that with the introduction of a union, Trim Trends will no longer be in a competitive economic situation. When Trim Trends ceases to be competitive, in Dundalk, I submit that the economic future for our area will indeed be one of despair.

I realize that my knowledge of unions is somewhat limited. But I do not know of any communities comparable in size to Dundalk, where any union has been the positive force in the creation and location of a new industry. Do the promoters of unions sincerely care about the welfare of the individuals in this area, or is this merely a way of creating positions for union organizers at the expense of area residents?

In retrospect, perhaps the Dundalk Development Board should have retained its existence and functioned in a public relations role between management and employees. As we all know, communication is the key element in solving any dispute. It is my understanding that active listening has been replaced at Trim Trends by open confrontation on several issues, negotiations must be reopened in an honest, forthright manner, if a reasonable solution is to be reached.

We realize that sincere attempts are presently being made to improve communication. Perhaps greater success could be achieved if committees from both the employee and management

groups could meet with an unbiased outside representative who could present a more objective over-view of the situation.

The importance of talking together cannot be over emphasized. Fill the suggestion box with your ideas. But make certain that the ideas are truly your own. Surely through honest and open negotiations you can resolve your differences and re-establish the type of working relationship which is essential if Trim Trends is to remain the chief employment centre in the Dundalk area.

Sincerely,  
Jack Seeley

15. Mr. Seeley testified that he wrote his letter of June 19, 1985 because of his interest in the community. Asked by union counsel how he learned in June that “sincere attempts are presently being made to improve communication”, as stated in his letter, Mr. Seeley replied that he had heard from employees that when they went to see Mr. Coe with complaints, they felt he was not listening to them. Mr. Seeley indicated that he did not know if he had actually heard that attempts were being made to improve communications, or if he surmised it when told that communications were not good. Union counsel then asked Mr. Seeley if in fact he had only surmised that attempts were being made to improve communications, and Mr. Seeley agreed that this had been the case. Union counsel then asked Mr. Seeley about his reference in his letter to a suggestion box. Mr. Seeley replied that when he was talking with Mr. Coe, Mr. Coe had indicated that the plant had a suggestion box, but he would not take any suggestions unless they were signed by an employee. Mr. Seeley earlier had indicated in his testimony that he had had a discussion with Mr. Coe in August of 1985, and it was to this discussion that Mr. Seeley was apparently referring to when explaining how he knew about the suggestion box. When union counsel reminded Mr. Seeley that the discussion in question had occurred subsequent to the publication of the June 19th letter, Mr. Seeley stated that he could not recall where the matter of the suggestion box had come up. Mr. Seeley’s evidence concerning how he came to know in June 1985 about attempts by the company to improve communications with employees, and about the suggestion box was contradictory and not at all persuasive. This, together with the fact that Mr. Coe did not testify, and the evidence of Mrs. Dillman and Mrs. Ryder that Mr. Seeley advised them in June that he had met with Mr. Coe, leads us to conclude that Mr. Seeley did, in fact, meet with Mr. Coe in or prior to June to discuss matters within the plant insofar as they affected employees. Given Mr. Seeley’s concerns about the possibility of the plant being unionized, it appears reasonable to infer that he raised the matter of the union with Mr. Coe.

16. On or about June 25, 1985, approximately one week after the publication in the newspaper of Mr. Seeley’s letter, at least two “petitions” in opposition to the union were signed by a number of employees. These petitions were never filed with the Board. Mrs. Suzanne Hodgkinson, an employee classified as a quality control inspector, testified that she obtained signatures on one of the petitions on the afternoon shift in order to ascertain how many employees were against the trade union. Mrs. Hodgkinson stated that the petition was placed on a table utilized by three quality control inspectors, including herself, and other employees came to the table to sign it. Mrs. Leona Henry, a shipper on the day shift, testified that she did not see the petition from the afternoon shift, but had another petition which she kept at the back of the plant, available for employees to come and sign.

17. Early in August, 1985 five employees met with Mr. Seeley at his home. This was the meeting attended by Mrs. Dillman and Mrs. Ryder referred to above where, amongst other



matters, Mr. Seeley indicated that he had met with Mr. Coe. The meeting was apparently arranged by an employee by the name of Chris Keating who asked other employees to attend, and asked Mr. Seeley to meet with them. Mr. Seeley testified that at this meeting employees complained to him about the respondent's plant being dirty, bonuses not being distributed evenly, and some employees receiving privileges not enjoyed by others.

18. Following the meeting with the five employees, Mr. Seeley went to see Mr. Coe at the respondent's premises. According to Mr. Seeley, he advised Mr. Coe about the complaints he had received from the employees, to which Mr. Coe indicated that he was trying his best to communicate with employees and that he had called them together in large groups and then in smaller groups to explain the company's position to them. Mr. Seeley testified that Mr. Coe suggested to him that he walk around the plant. Presumably this suggestion related to complaints about the plant being dirty. According to Mr. Seeley, he decided that he would go to the back of the plant to see a relative of his who worked there, and then spent about ten or fifteen minutes walking through the plant without finding his relative. Mr. Seeley indicated that on his walk he might have spoken briefly to two or three employees, and he specifically recalled having either spoken with, or waved to, Mrs. Leona Henry. Over the years, Mr. Seeley had paid a number of visits to the respondent's premises. These all involved visits to the office area primarily to collect money from the company for various charitable causes. Mr. Seeley testified that on one occasion he had stood at the plant door with a local candidate in an election, but that prior to the day in question he had never actually been inside the plant itself.

19. The union filed its application for certification on September 6, 1985. On or about Tuesday, September 10, 1985, the respondent posted copies of the Board's Form 6 (the "green sheet") which advised employees of the application. On Wednesday, September 11th, Mrs. Hodgkinson, who it will be recalled had been responsible for one of the anti-union petitions in June, called the lawyer referral service run by the Law Society of Upper Canada. She was given the name of a lawyer in Orangeville. This lawyer indicated he would be unable to assist her, and in turn provided her with the name of a lawyer in Toronto. The lawyer is with the same firm as company counsel in this case. Mrs. Hodgkinson testified that the lawyer did not ask her name or the name of the company she worked for, although he did advise her that any statement of desire in opposition to the application should not be circulated on company property, and management should know nothing about it. Mrs. Hodgkinson testified that from the lawyer she received the impression that the petition she had from June would not be any good. Mrs. Henry, who it will be recalled had obtained signatures on another petition in June, testified that another employee, Mrs. Winona McCracken, advised her the day the green sheet went up that her petition also would not be any good.

20. After Mrs. Hodgkinson had talked to the lawyer in Toronto, she discussed the possibility of circulating statements of desire with a few other employees. Mrs. Hodgkinson decided upon the heading to be used on the statements of desire. There were some discrepancies in the evidence concerning who told who about the heading to be used, and when. These discrepancies, however, appear to have been caused only by difficulties of recollection. Word was passed around the plant that statements against the union could be signed at the homes of Mrs. Hodgkinson, Mrs. Henry, Mrs. Winona McCracken and Mrs. Mary Fasciano. On September 12, 1985 employees started coming to the homes of these employees to sign statements of desire against the union. The evidence indicates that employees generally stayed only long enough to exchange a few pleasantries, sign their names

and then leave. Mrs. Henry, Mrs. McCracken and Mrs. Hodgkinson also arranged for employees to sign statements in their presence at the homes of two other employees who live in close proximity to the plant. Mrs. Henry also witnessed the signatures of four employees in a family room located behind Mr. Aitchison's insurance office. Mr. Aitchison, who is a long-time friend of Mrs. Henry, agreed to Mrs. Henry's request that she be able to use his premises since it was located on the main street. On Monday, September 16, 1985, the employees who had been collecting signatures on the statements of desire gave them to Mrs. Henry. On or about September 17th Mrs. Henry mailed the documents to the Board.

21. The group of employees opposing the application were represented by counsel throughout these proceedings. Some of the money for counsel fees was raised by contributions from certain of the employees. Mr. Seeley was also involved in assisting in this regard. Mr. Seeley indicated to Mrs. Henry that funds for a lawyer could be advanced from the fund comprised of interest earned on amounts repaid by the company on its loan. Mr. Seeley in his testimony indicated that he had also been involved in the selection of a lawyer by the group of objectors, and that he had accompanied the objectors to the hearings before the Board. Indications are that Mr. Seeley's involvement in selecting a lawyer and his comments about using monies from the fund occurred after the statements of desire had been mailed to the Board.

22. The union contends that we should draw certain inferences from the fact that one of the company's foremen did not interfere when an employee had some T-shirts delivered to the plant shortly prior to a break. The T-shirts bore a slogan designed to indicate that the wearer was opposed to the union. Prior to this, a number of employees had been wearing pro-union T-shirts without any objection or interference from company officials. Given this fact, the foreman's inaction with respect to the anti-union T-shirts is not a matter which we believe should be given any weight.

23. As indicated above, the issue in this case is whether we can be satisfied that when union members signed the statements of desire they did so voluntarily and were not motivated by a perceived threat to their job security or a concern that a failure to sign might be communicated to their employer. The union contends that particularly because of the anti-union role played by Mr. Aitchison and Mr. Seeley, and their links with the company, the statements of desire cannot be given any weight. The group of objectors and the company, however, contend that the actions of Mr. Aitchison and Mr. Seeley are not relevant to this issue.

24. The Board is concerned that management not engage in any action that might be perceived as involving management with a statement of desire or which might give rise to a perceived threat to employee job security. This concern arises out of the ability of management to affect an employee's livelihood. The same concerns do not generally arise with respect to members of the general public who enter the debate about whether or not employees of a particular company should join a trade union. Employees can assess the arguments of members of the public and decide what weight, if any, to give their views, much the same as they assess the views of friends and relatives in deciding whether or not to join a trade union. However, to the extent that a member of the public may be associated in the minds of employees with management, his actions and statements will take on a greater significance.

25. As already indicated, we are satisfied that prior to Mr. Aitchison writing his letter

to the editor of the local newspaper, he did not discuss the matter with the management of the company. Nevertheless the language he utilized would have suggested that he was in possession of information from management, a troublesome fact given his statement that:

“I am led to believe a union vote would cause management to farm out more jobs in other areas, with an actual loss of jobs here”.

Prior to writing his letter, Mr. Seeley actually met with Mr. Coe and this was reflected in certain comments in his letter. Mr. Seeley’s letter recounted his personal role in getting the respondent to locate in Dundalk and how in the process of doing so the development committee had convinced the company that area residents “were not the type of people who would readily accept union rule”. Certain of his comments, particularly those cited below, clearly associated the unionization of employees with a loss of employment:

“I feel that I must express my concern over recent developments which I perceive to be a real threat to the continuing prosperity of the Dundalk community. ... it is my sincere belief that with the introduction of a union, Trim Trends will no longer be in a competitive economic situation. When Trim Trends ceases to be competitive, in Dundalk, I submit that the economic future for our area will indeed be one of despair.”

It is noteworthy that in his letter Mr. Seeley did not say that if a union were certified, and if, during the course of negotiating a collective agreement, it made demands which, if accepted, would make the company uneconomic, and if the company agreed to those demands, then jobs might be lost. Instead he equated unionization with an automatic loss of competitiveness and a loss of jobs. Approximately one week after the publication of this letter, employees began to sign petitions against the union at the plant.

26. Mr. Seeley linked himself even closer to management in the view of any reasonable employee when he spent ten or fifteen minutes walking through the plant. Presumably members of the general public are not allowed access to the plant without management’s permission. In the 17 years that the company had been operating in Dundalk Mr. Seeley had never been in the plant. Mr. Seeley’s walk about the plant would have suggested to employees that his earlier comments linking unionization of the company and loss of employment were not simply the result of speculation on the part of an outside observer, but rather the informed comments of someone with direct connections with management. The respondent is the major employer in the Dundalk area. Given these facts, a reasonable likelihood exists that employees who had become union members subsequently signed the statements of desire not out of a truly voluntary change of heart about being represented by a trade union, but rather due to a fear that unionization would result in a threat to their job security. The later involvement of Mr. Seeley in selecting a lawyer for the group of objectors and in offering to advance funds to pay the lawyer from interest earned on payments made by the company, would only have served to increase such concerns.

27. In all the circumstances, the Board is not satisfied that the statements of desire represent a reliable indicator of the voluntary wishes of the union members who signed them. Accordingly, the Board is not, on the basis of the statements of desire, prepared to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote.

28. The group of objecting employees has raised certain allegations concerning the manner in which the applicant obtained its membership evidence. The objectors contend that



the allegations, if proven, will affect the weight to be given to the membership evidence. The Registrar is directed to re-list this matter for hearing for the purpose of hearing the evidence and the representations of the parties with respect to this issue. In that no evidence has yet been led on this issue, this panel is not seized of the matter.

29. The matter is referred to the Registrar.

## **DECISION OF BOARD MEMBER R. J. GALLIVAN;**

1. I disagree with the conclusion reached by the majority. There is no credible evidence that the statement of desire is anything but what it purports to be and which the testimony of several witnesses attests it to be - the voluntary expression of the wishes of employees, some of whom opposed the union from the outset and some of whom initially were union supporters but who quite understandably changed their minds as the union's organizing campaign progressed and the quality of its rhetoric deteriorated.

2. In the final analysis the majority's conclusion that the statement of desire does not represent the voluntarily expressed views of employees rests on the alleged influence on the employees of a letter written to the editor of a local newspaper by Mr. Aitchison, and on the majority's unwillingness to accept the evidence of Mr. Seeley and his unique role in the community. A number of other incidents which occurred during the union's organizing campaign are catalogued and examined by the majority but each in turn eventually is dismissed, quite properly in my view, as being either not germane or of no consequence. For example:

i) the Company's letter to employees of May 16, 1985 is concluded to have been not improper, apparently particularly because the union did not object to it (although even if it had, such an objection in my view could not be sustained);

ii) the earlier petitions may or may not have been gathered properly, but in any event were never sent to the Board;

iii) the letter opposing the union to which the Steelworkers' District Director responded was written by the husband of a Company employee, but an employee it turns out who is in the proposed bargaining unit, not a member of management;

iv) the pro and anti-union T-shirt issue is a non-event, although, as I will outline later, the testimony about it is quite helpful for another reason;

v) reference is made to the newspaper article describing the Company's winning of the Ford "Quality Award". The formal presentation of that award to the Company's officials apparently was made in Michigan some time after the award had first been won. If there is anything sinister or anti-union in the local newspaper's publishing of such news, or in the timing of the event, it is obscure.

3. The key issue is the role of Messrs. Aitchison and Seeley. Gordon Aitchison is a

community activist of long standing. He was born in the area and has lived there all his life. He was a member of the Town Council for 17 years and a Reeve for 13. Obviously his role in such a small community is well known to all but the most recent newcomers. Nevertheless, the majority views Mr. Aitchison's May 22nd letter to the editor as having unduly influenced the employees who four months later, in mid-September, signed the petition. This condemnation by the majority results apparently only because Mr. Aitchison's letter implied that he was in possession of information from the Company. Even disregarding the long time interval which separated his letter from the date employees signed the petition, I submit that it is reasonable to expect more readers of his letter to put a quite different interpretation on it than that put by the majority. Mr. Aitchison has been in business as an insurance agent in the Dundalk community for 28 years (but has never sold insurance to this Company) and, more importantly for our purposes, has been an active politician in that community for much of his adult life. When a politician writes a letter to a newspaper espousing a particular point of view (in this case happening to oppose the union), I submit that most readers accept statements such as "...I am led to believe..." for the political hyperbole that they usually are. It is crucial for a politician not only to be aware of developments in his constituency, but also, and just as importantly, to be *seen* as being aware. I believe it is reasonable to conclude that Mr. Aitchison's style of letter writing simply reflects his many years of active political involvement, and that most of his readers would reasonably conclude likewise. Furthermore, we know from the evidence of the union's own witnesses that some of the employees do not read letters to the editor. It is thus reasonable to conclude that his letter had little, if any, influence on employees.

4. Petitioners have little time in which to organize their opposition to a union application for certification. What is colloquially known as the "green sheet" is posted in the employer's premises advising employees that a union has applied for certification and setting a terminal date for any response, usually not more than a few days later. The evidence in this case is that the green sheet was posted on September 10th, with a terminal date of September 17th, and that the statement of desire was signed by 118 of the 232 employees in the bargaining unit in the period September 12th to 16th. It stretches credulity to conclude that in that short period of time when employees were signing their petition Mr. Aitchison's letter of four months earlier was in their minds.

5. The majority quite rightly accepts Mr. Aitchison's testimony that he had had no contact with management of the Company before writing his letter and that his statements about the potentially damaging consequences of unionism were assumptions he personally had made as an observer of the Canadian scene. Contrary to the implied criticism of the Company by the majority, I believe the Company acted quite prudently in not taking steps to dissociate itself from Mr. Aitchison's views of unionism, for to do so could have enmeshed it in a public debate on a sensitive topic in the midst of a union organizing campaign.

6. A similar conclusion should also be made about Mr. Seeley's involvement as an outsider which was somewhat more extensive than Mr. Aitchison's. Mr. Seeley is perhaps even better known in the community than Mr. Aitchison. He was born adjacent to the Village and has lived in it since 1943. In addition to having been a Councillor and later a Reeve, Mr. Seeley served on the Industrial Development Board which successfully persuaded the Company to move to Dundalk. He continues to serve as a Trustee of the funds which that initiative generated, and for many years has been active in local clubs, lodges, the Legion and so forth. He has been made an honorary fireman after having been a volunteer fireman for 28 years,

and has been named the community's Man of the Year. He worked at a number of occupations but for the 15 to 20 years prior to retirement he ran his own school bus business. According to his own testimony, everyone in Dundalk would know who he is. That assertion would be difficult not to accept in a broad sense.

7. As an active and aware member of the community in which he retains a keen interest, he was prompted by his own concern for the welfare of the community to write his letter to the newspaper. Not surprisingly, he testified that it was common knowledge and a subject of conversation in coffee shops in town that a union organizing campaign was underway. As a result, he decided on his own initiative that it would be useful to remind employees, through a letter to the local newspaper, of the history of the community's involvement with the plant and of his views of the risks of unionism. To suggest, as implied by the majority, that only then did employees become aware that there might be some risks to themselves and their employer if they were unionized, and that the June letter prompted the employees to sign the petition in September, is again to stretch credulity.

8. In fact, Mr. Seeley's letter was followed later in the summer by a letter from Dave Patterson, the Steelworkers' then District Director, responding to an earlier letter from Mr. Lougheed (who, as we saw above, is the husband of a non-management employee in the proposed bargaining unit). Mr. Patterson's letter lauds his union's efforts to assist members during lengthy strikes by helping them to avoid losing their homes and to keep themselves and families fed by truckloads of food shipped into the community. While defending his union's numerous strikes against Inco in Sudbury, Mr. Patterson, no doubt unwittingly, was proving Mr. Seeley's contention that there are indeed risks in unionism. In my view, that letter, closer in time to the signing of the petition than Mr. Seeley's letter, as well as one of the union's distasteful leaflets distributed to employees accusing employers of "age-old Hitler method(s)" and of attempting to divide employees along religious and racial grounds, is much more likely to have influenced some former union supporters to sign the petition than did anything in Mr. Seeley's letter.

9. The majority has decided not to accept Mr. Seeley's direct evidence that during the period of the union's organizing campaign his first contact with anyone at the plant was when five employees visited his home in early August. Two of those five employees claimed that he had said he had been talking to Mr. Coe, the plant manager. When it is recalled that Mr. Seeley's evidence was given to the Board on November 21st and that the contradictory evidence was given on December 20th, by two union witnesses, Mrs. Dillman and Mrs. Ryder, and, further, that those two employees had attended the earlier Board session and heard most of the evidence, I am inclined to accept Mr. Seeley's evidence over theirs. The majority concludes that his knowledge of what was happening in the plant must have come from management. Yet his own uncontradicted testimony is that he has a relative working in a back shed at the plant, that Leona Henry, one of the organizers of the petition, is a neighbour who he sees frequently at various functions in town, and that in a small town such as Dundalk developments at the plant (its major industry) are a common topic of coffee shop conversation. In those circumstances, one need not have contact with management to be aware of what is happening. I thus have no hesitation in accepting his testimony.

10. Mr. Seeley's meeting in August with the five employees at his home was at their request and initiative, not his. That was corroborated by the union's own witnesses. The five described to him some of the conditions in the plant which they regarded as unsatisfactory,



and asked for his help. He agreed to visit the plant on their behalf. He testified that he went to the plant and confronted Mr. Coe with the employees' complaints. These were discussed between the two of them, after which Mr. Coe invited Mr. Seeley to see the plant for himself, apparently because one of the complaints was about the plant being dirty. Mr. Seeley then walked through the plant for a period he testified was 10 to 15 minutes during which he was unable to locate his relative who works there. He further testified that he spoke or waved to some of the employees he knew personally, including his neighbour Mrs. Henry, and left.

11. In assessing the impact of his plant visit on employees, it is useful to note from the evidence that this plant works shifts. Even if everyone at work on that shift that day saw him (and the evidence is that they did not), that was only one shift of employees. It is also useful to recall the evidence adduced about the T-shirt incident since part of it entailed a description of the layout of the plant and of who could see who from where. That evidence is that it would take 30 minutes for someone to walk the periphery of the plant and along all the aisles where employees work. Mr. Seeley was there for 10 to 15 minutes. The layout evidence also is that the size of some of the production process machines, such as presses, is such as to block the view across aisles. It is thus highly unlikely that Mr. Seeley was seen by very many employees at work on that one shift, and highly likely that many of those who did see him would recognize him simply as a respected and active member of the community, not as a surrogate for management.

12. In its outline of the facts the majority correctly states (paragraph 21) that:

"Indications are that Mr. Seeley's involvement in selecting a lawyer and his comments about using monies from the fund occurred *after* the statements of desire had been mailed to the Board."

(Emphasis added)

That accords with my notes and recollection of the evidence. I am thus unable to reconcile the majority's statement in paragraph 26, in relation to the voluntariness of the petition, that:

"The later involvement of Mr. Seeley in selecting a lawyer for the group of objectors and in offering to advance funds to pay the lawyer from interest earned on payments made by the company, would only have served to increase such concerns."

Since Mr. Seeley's offer to help came only after the statement was mailed to the Board, it could hardly have had the effect attributed to it by the majority of influencing the addition of any former union member signatures to the petition.

13. In view of all of the foregoing, this Board should not allow the petitioners' desire to avoid being unionized by this union to be jeopardized by two well-meaning community activists over whom neither they nor their employer have any control. To conclude otherwise, as the majority has done here, is to remove the employees' destiny from their own hands. It imposes on them a decision which tells them that they are incapable of judging the facts for themselves or of making up their own minds. While there is a bias in the Ontario *Labour Relations Act* in favour of unionism, it also acknowledges the right of employees to choose to remain union free. In broad terms, this Board must guard against allowing the exercise of that right to be frustrated by a paranoia which sees an employer conspiracy in every shadow

or, as here, in the peripheral intervention (in one case months before the event) of well-intentioned but high profile members of the community.

14. The long delays which the employees, Company, and the union have experienced with this certification application filed over six months ago, and the further delays yet to be suffered, do not serve the interests of labour relations in general or this plant in particular. An immediate secret ballot vote by employees would help clear the air and, if won by the union, would help eliminate the mistrust and miscalculations which so often accompany first-contract negotiations where the union has been certified without a vote. If this Board would look out for the rights of individual employees as diligently as it does for those of institutions by deciding more frequently in favour of certification votes in petition cases, the pressure for legislation to impose first-contract settlements would soon disappear. That proposed legislation treats the symptoms rather than the causes of many, if not most, first-agreement strikes, causes most frequently traceable to the absence of a secret ballot vote by employees during the certification process. Such a vote should be ordered here.

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**2561-84-R Ontario Public School Teachers' Federation, Applicant, v. The Board of Education for the City of Windsor, Respondent**

**Certification - Trade Union - Trade Union Status - Whether principals exercising managerial functions - Whether admission of persons exercising managerial functions depriving union status - Whether occasional teachers eligible to become members - Whether sexual discrimination precluding certification - Whether Ontario Public School Teachers' Federation having trade union status**

**BEFORE:** *R. O. MacDowell*, Vice-Chairman, and Board Members *I. M. Stamp* and *J. Kennedy*.

**APPEARANCES:** *Naomi Duguid*, *Ethan Poskanzer*, *Mary Hill* and *Ross Andrew* for the applicant; *Leonard P. Kavanaugh Q.C.*, *V. Bill Piliotis* and *D. C Hyland* for the respondent.

**DECISION OF THE BOARD;** March 5, 1986

Background

1. The name of the respondent is amended to read:  
"The Board of Education for the City of Windsor".

2. This is an application for certification in which the applicant ("OPS") seeks to represent certain "occasional" or "supply" teachers working in the respondent's elementary school system. OPS is a teacher organization which already represents a large number of the respondent's elementary school teachers. The ultimate issue in this case is whether OPS will be entitled to represent supply teachers too.

3. This proceeding is but one of many certification applications arising out of recent efforts by occasional teachers across Ontario to form or join a trade union.

4. It appears that there are approximately 80 occasional teachers potentially affected by the present application. On the basis of the documentary evidence of membership filed with the Board, it is evident that the vast majority of those employees want to be represented by OPS. For its part, OPS wants to represent them. The question is whether OPS is permitted to do so. The employer's position is that OPS is not legally entitled to represent occasional teachers.

5. The respondent objects to the application on two broad grounds: that OPS is not a "trade union" entitled, under the *Labour Relations Act*, to represent this group of employees, and, further, that even if OPS is a trade union, the terms of its constitution and section 13 of the *Labour Relations Act* preclude its certification. That position is summarized in a letter from the respondent's counsel dated January 28, 1985. The material portions of that letter are reproduced below:

• • •

In the Reply which we filed on behalf of the Respondent, the Respondent pleaded that the Applicant is not a trade union as defined in Section 1(1)(p) of the *Labour Relations Act* due to the fact that its membership includes persons who are not employees pursuant to Section 1(3) of the *Act*.

At the commencement of the hearing on January 25, 1985, I advised the Board that the Respondent was raising additional objections to the certification of the Applicant and these additional objections were outlined to the Board. At the conclusion of the sitting on that date, the Chairman requested that I file a letter with the Board deliniating [sic] the additional objections of the Respondent.

In addition to the pleading contained in paragraph 10 of the Reply of the Respondent, previously filed, the Respondent pleads:

1. The Applicant is an organization of persons who are excluded from the application of the *Labour Relations Act* pursuant to Section 2(f) thereof, and, accordingly, the Applicant is not an organization of employees and therefore not a trade union as defined in Section 1(1)(p) of the *Act*.

2. The Applicant, even if it is found to be a trade union as defined in Section 1(1)(p) of the *Labour Relations Act*, cannot be certified as the bargaining agent with respect to the proposed bargaining unit because:

(a) Women teachers, (even if that phrase can be interpreted as excluding women occasional teachers), who teach in elementary public schools, cannot be members of the Applicant and the Applicant therefore discriminates against persons because of sex contrary to Section 13 of the *Labour Relations Act*.

(b) In the alternative to the preceding paragraph, if women teachers, (even if that phrase can be interpreted as excluding women occasional teachers), can be members of the Applicant, the Applicant makes a distinction between its male and female members and the Applicant therefore discriminates against persons because of sex contrary to Section 13 of the *Labour Relations Act*.

(c) The Applicant is seeking certification with respect to persons (occasional teachers who teach in elementary public schools) who cannot be members of the Applicant.

(d) In the alternative to the preceding paragraph, the Applicant is seeking



certification with respect to persons (women occasional teachers who teach in elementary public schools) who cannot be members of the Applicant.

Such further and other grounds as the Respondent may advise and the Board permit, arising out of, but not limited to, further evidence called and exhibits filed, including, but not limited to, evidence called and exhibits filed regarding the Constitution, by-laws and affairs of the Applicant.

• • •

The provisions of the *Labour Relations Act* referred to by counsel are as follows:

1.-(1) In this Act,

• • •

- (p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2. This Act does not apply,

• • •

- (f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

Other related statutory provisions are sections 1(1)(l), 48, 64 and 106(2):

1.-(1) In this Act,

• • •

- (1) "member", when used with reference to a trade union, includes a person who,

- (i) has applied for membership in the trade union, and

- (ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and "membership" has a corresponding meaning.

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or
- (b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

6. The issues which we will consider below can be summarized schematically as follows:

(1) Is OPS a "trade union"?

- (i) Can an organization be a trade union if it admits to membership persons exercising managerial functions within the meaning of section 1(3)(b) of the Act?
- (ii) Do principals *in fact* exercise such functions [assuming a section 1(3)(b) standard were applicable to them]?
- (iii) Does it matter that virtually all of OPS' members are teachers excluded from the *Labour Relations Act* by section 2(f) thereof?

(2) Can the Board certify OPS?

- (i) Does OPS, as an organization, engage in sexual discrimination which, in turn, precludes its certification in accordance with section 13 of the Act?
- (ii) Can OPS, under its constitution, admit occasionals to membership, and can such occasionals be counted as "members" for the purposes of the *Labour Relations Act*?

We might note that no *employee* has expressed any opposition to the applicant's certification. In particular, no *employee* has raised any concern that school principals or other allegedly "managerial" persons are members of OPS. No *employee* contends that OPS, in structure

or practice discriminates on the basis of sex or otherwise. No *employee* asserts that the respondent has participated in the formation of OPS or has given it support. In short, no employee has expressed any concern or support for matters raised by the respondent as a bar to representation by OPS. Nor does the employer contend that it has interfered with the formation (etc.) of OPS, or that OPS is a dependent, employer-dominated organization.

7. The employer's position on these various issues will be examined in greater depth later. First, it may be useful to sketch in the context in which the present case arises, for as will shortly be seen, some of the issues raised by the respondent have already been litigated in other cases involving occasional teachers. (See *Board of Education for the City of York* ("York No. 1"), [1984] OLRB Rep. Sept. 1279 and *Board of Education for the City of York* ("York No. 2"), [1985] OLRB Rep. May 767.) OPS relies on those decisions, pointing out that, in many respects, it is an organization with status and statutory responsibilities similar to OSSTF, which was the applicant in those earlier cases, and which the Board there found to be a "trade union". Accordingly, if we were to accept certain of the propositions urged upon us by the respondent, the result of this case might have ramifications well beyond whether some 80 occasional teachers can be represented by OPS if that is their wish.

8. We will begin with an overview of the legislation which assigns occasionals and classroom teachers to two, somewhat different collective bargaining regimes.

#### The Legislation Governing Collective Bargaining for "Occasionals" and Regular "Contract" Teachers, and the Special Features of Bill 100

9. It is common ground that the collective bargaining rights of occasional teachers are regulated by the *Labour Relations Act*. They are not "teachers" as defined by the *School Boards and Teachers Collective Negotiations Act* 1975, R.S.O. 1980, c.464 ("Bill 100"), and thus, they are not excluded by section 2(f) of the *Labour Relations Act* [see section 230 of the *Education Act*, R.S.O. 1980, c.129, and section 1(1)(m) of Bill 100]. The result is that, for collective bargaining purposes, the occasionals fall under the *Labour Relations Act*, while the classroom teachers whom they replace are covered by Bill 100.

10. We do not think that it is necessary to review the various statutes governing the teaching profession or bearing upon a teacher's employment relationship. Such review was undertaken in *York No. 1*, *supra*, at pp. 1285-1296, and need not be repeated here. However it is useful to sketch in some of the background and special features of Bill 100. In *York No. 1* the Board summarized these as follows:

#### School Boards and Teachers Collective Negotiations Act: "Bill 100".

20. The *School Boards and Teachers Collective Negotiations Act* was enacted in July of 1975. Before its enactment, no special or general legislation regulated collective bargaining between teachers and school boards in Ontario. Collective bargaining did, however, take place between them (see J. Douglas Muir, *Collective Bargaining by Canadian Public School Teachers*, Task Force on Labour Relations Study No. 21 (Ottawa: Information Canada, 1968); Bryan M. Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy in Ontario* (Industrial Relations Centre, Queens University, Kingston, Canada, 1978); and Peter Hennessy, *Schools In Jeopardy: Collective Bargaining in Education*, (McClelland and Stewart, Toronto, 1979)). In October, 1970, the Ontario government established a committee of inquiry whose terms of reference were to inquire into, report upon



and make recommendations with respect to the process of negotiation between teachers and school boards, including, *inter alia*, the definition of bargaining units. The committee formally known as The Committee of Inquiry Into Negotiation Procedures Concerning Elementary and Secondary Schools of Ontario was chaired by Judge Reville and will be referred to here as the Reville Committee. It prepared a report dated June, 1972 entitled "Professional Consultation and the Determination of Compensation for Ontario Teachers" in which it reviewed the matters referred to for inquiry and set out its recommendations. The committee's recommendation with respect to bargaining unit scope was that the bargaining agent should represent all employees of a board who hold a teaching certificate, except supervisory officers of the school board. The Ontario Teachers' Federation, which took the position that it should be the statutory bargaining agent for teachers, responded to that recommendation this way:

The Federation feels that the Committee's recommendation is not precise enough. For example, the Federation does not feel a responsibility to negotiate the salary of an employee of a board who holds a teaching certificate which is not a prerequisite under the Schools Acts and Regulation for employment - for example, a clerical worker with teacher qualifications who works in a school board's office.

The Federation recommends that the members of a teacher negotiating entity shall include those persons coming under the definition of "teacher" in the Teaching Profession Act ... (*Submission to the Minister of Education in Response to the Report of the Committee of Inquiry into Negotiations Procedures*, Ontario Teachers' Federation, June, 1972, p. 6.)

Very few of the Reville Committee's recommendations were implemented in Bill 100. The definition of "teacher" ultimately adopted in Bill 100 incorporates all of the elements of the definition of that term in the *Teaching Profession Act* and adds for good measure the stipulation that the employee be employed "as a teacher". Whether that approach achieved precision might now be a matter of debate.

21. The scheme adopted in Bill 100 was that each teacher employed by a board would be represented by an organization called a "branch affiliate" consisting of all the teachers employed by a board who are members of the same "affiliate". (s. 1(a)). Each of the five affiliates of the Federation is an "affiliate". Paragraph 1(m) defines teacher this way:

- (m) "teacher" means a person,
  - (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
  - (ii) who holds a letter of standing granted by the Minister under the *Education Act*,
  - (iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month;

The Act applies to all "teachers":

3.-(1) This Act applies to all collective negotiations between boards and teachers in respect of any term or condition of employment put forward by either party for the purpose of making or renewing an agreement.

5. A branch affiliate shall, in negotiations and procedures under this Act, represent all the teachers composing its membership.

It also applies to principals and vice-principals, who are members of the bargaining unit, although they are not permitted to strike:

64.-(1) A principal and a vice-principal shall be members of a branch affiliate.

(2) Notwithstanding subsection (1), in the event of a strike by the members of a branch affiliate each principal and vice-principal who is a member of the branch affiliate shall remain on duty during the strike or any related lock-out or state of lock-out or closing of a school or schools.

The Act contemplates the continued significance of the individual contract of employment between the board and a teacher:

54.-(1) An agreement between a board and a branch affiliate shall be deemed to form part of the contract of employment between the board and each teacher who is a member of the branch affiliate.

(2) Where a conflict appears between a provision of any other part of a contract of employment and a provision of the agreement referred to in subsection (1), the provision of the agreement prevails, but no agreement shall conflict with the form of contract prescribed by the regulations under the *Education Act*.

22. The approach to collective bargaining adopted in Bill 100 differs in a number of respects from the approach of the *Labour Relations Act*. There is no provision for certification of bargaining agents or determination of the appropriate bargaining unit; both the bargaining agent and the scope of the bargaining unit are fixed by Bill 100. The parties are not free to determine the commencement and expiry dates of their collective agreement; under Bill 100, collective agreements must become effective on the 1st day of September and expire only on the 31st day of August in a subsequent year. To be effective, notice to bargain must be given in the month of January in the year in which the agreement expires, considerably earlier than would be the case under the *Labour Relations Act*. Bill 100 provides for fact finding, rather than conciliation, as the third party intervention prerequisite to the resort to the sanctions of strike and lockout. In addition to fact finding, section 63 of Bill 100 prescribes a number of other prerequisites to strike or lock-out activity beyond those found in the *Labour Relations Act*, including a vote on the Board's final offer and a strike vote, with both votes conducted under the supervision of the Education Relations Commission, as well as at least five days' written notice to the board of the date on which the strike will commence. Like the *Labour Relations Act*, Bill 100 imposes on each of the parties to collective bargaining the obligation to bargain in good faith and make every reasonable effort to make or renew an agreement. Jurisdiction to assess and enforce compliance with this obligation is assigned to the Education Relations Commission, which is also assigned a number of other duties which have no equivalent in the jurisdiction assigned to the Ontario Labour Relations Board under the *Labour Relations Act*. Bill 100 assigns to the Ontario Labour Relations Board jurisdiction over applications for a consent to prosecute alleged contraventions of the Act (subsection 77(6)), and applications for declarations and directions with respect to allegedly unlawful strikes and lockouts (section 67).

11. In passing Bill 100, the Legislature was, to some extent, merely giving formal statutory recognition to institutions and bargaining processes which were already well established. Teachers were not covered by the *Labour Relations Act* but they were already bargaining collectively through their own organizations, and, on occasion, even engaged in work stoppages. As Osler J. observed in *Board of Education for the City of Windsor v. Ontario Secondary School Teachers' Federation et al.*, (1975) 7 O.R. (2d) 26:

In practice, elaborate agreements resembling collective agreements as contemplated by the *Labour Relations Act* are made for various periods of time between Boards and the Ontario Teachers' Federation or a component part thereof such as the respondent Federation.

Remuneration agreed to by these documents automatically replaces the initial salary provided for in the teacher's individual contract and hence the identity of such contract as an individual contract between employer and employee has tended to become blurred.

That case, decided before Bill 100, involved a concerted refusal to work - something which would be a "strike" under the *Labour Relations Act*. Osler J. refused to enjoin the activity observing, in passing, that "there is neither a collective agreement nor a statute imposing a particular code of labour relations on these parties". That changed the following year.

12. Bill 100 provided a new statutory framework for an already well-established but voluntary collective bargaining system, and it had many interesting features - as the Board noted in *York No. 1*. One of them is that principals share most of the collective bargaining rights of their professional colleagues. They are not only members of the same bargaining unit and bargaining agent as other teachers but the legislation *requires* that this be so. But what is also interesting for this case (and not stressed in *York No. 1*) is the extent to which the Legislature gave its imprimatur to a system in which the teacher collective bargaining organizations continue to be defined and divided on the basis of religion, language, or gender. The affiliates (*inter alia* statutory collective bargaining agencies) defined by Bill 100 are: The Ontario Secondary School Teachers' Federation (OSSTF), The Ontario Public School Men Teachers' Federation (now OPS), The Ontario *English Catholic* Teachers' Association (OECTA), The Federation of *Women* Teachers' Association of Ontario (FWTAO), and L'Association des Enseignants *Franco-Ontariens* (AEFO). Under Bill 100 a male elementary school teacher is (and must) for collective bargaining purposes be represented by OPS. A female is (and must) be represented by FWTAO. A Francophone is represented by AEFO. A Catholic Anglophone is represented by OECTA.

13. No doubt, in passing Bill 100, the Legislature sought to formalize and preserve institutional arrangements with deep historical roots, that had been developed by the parties themselves and, presumably, reflected their own norms and needs. Bill 100 did not fundamentally alter the major players or the established bargaining process. It largely "institutionalized" the status quo, and superimposed a variety of new dispute settlement mechanisms. However, in so doing, the Legislature has given its blessing to institutional arrangements based on ethnicity, religion or gender. Indeed, it indirectly compels membership in such organizations. We shall return to this theme later.

14. Bill 100 was passed in the wake of one committee of inquiry. It was soon to be scrutinized by another. In 1979, pursuant to section 9 of the *Education Act*, the Minister of Education established "the Matthews Commission" to review the collective bargaining process between teachers and school boards. Its recommendations were unanimous on those issues potentially relevant to this case. They are summarized at paragraph 4 of *York No. 2*:

7. The Report comprises some 137 pages, and from our perspective, there are only two aspects of particular interest. The first is that the Commission explicitly considered the position of occasional, night school, and summer school teachers and recommended that Bill 100 be amended to provide for their inclusion in bargaining units represented by the various teachers' federations [see the discussion at pp.47-48 of the Report]. The Commission also considered whether principals and vice-principals should be full members of the teachers' federations and the bargaining units they represent - an issue that was contentious when Bill 100 was drafted and remained highly controversial. The outlines of what was obviously a spirited debate appear at pages 40-47 of the Commission Report. Ultimately, the Commission concluded that principals and vice-principals should remain in the bargaining unit:



The Commission believes that it is possible that the position of principal would be judged under *The Labour Relations Act* to be a "management" position and therefore would be excluded from the bargaining unit. However, Bill 100 was enacted in 1975 specifically because it was thought that *The Labour Relations Act* was not suitable for the public education sector.

There have been no amendments to Bill 100 dealing with the position of occasional teachers, or principals and vice-principals. To date, the Legislature has chosen to maintain the status quo. Occasionals are covered by the *Labour Relations Act*. The regular classroom teachers whom they replace are covered by Bill 100.

15. This legal bifurcation creates some obvious anomalies and problems. It fragments the bargaining structure available to certified teachers working in Ontario Schools. Even if OPS is entitled to represent occasionals they would be in a separate bargaining unit; and, of course, if the respondent is right, the Legislature has erected a scheme which prevents occasionals from being represented by the established organizations which already represent teachers in collective bargaining, and to which many occasionals have turned for assistance. It is ironic (but conceded by the respondent) that if the occasionals sought to be represented by the Teamsters, or any other "general union", there would be no impediment whatsoever. The problem arises in this case only because the occasional teachers want to be represented by OPS. In addition, should the occasionals seek to organize, they will necessarily be confined to a bargaining unit composed solely of casual employees - something which the Board would not usually consider conducive to an orderly collective bargaining relationship. Finally, how does one define the degree of attachment necessary to indicate an "employment relationship" for individuals who are only engaged on a casual basis? For collective bargaining purposes, who should be treated as an employee in the bargaining unit?

16. It is not clear why occasionals were omitted from Bill 100. There is no indication that the Legislature has ever turned its mind to their situation. Perhaps it is simply that occasionals were not part of the pre-1975 bargaining process and had not indicated any appetite for collective bargaining. But that has certainly changed. The Board has dealt with or currently has before it, certification applications involving literally hundreds of occasional teachers seeking representation by the statutory collective bargaining agents which represent their teacher counterparts covered by Bill 100. One of those cases involves the respondent's secondary school supply teachers and an application by OSSTF - see Board File 3042-84-R. The question in this case is whether elementary school teachers employed by the respondent can be represented by OPS.

17. With this background then, we turn to the evidence. We will then review the various propositions advanced by the respondent.

#### The Evidence - The Relationships of Principals, Occasionals and Contract Teachers

##### I

18. The facts were not substantially in dispute. Mr. D. Hyland, a "supervisory officer", explained his role, and the relationship of school principals to regular contract teachers and

occasionals. Mrs. Kelk, a school principal and voluntary member of OPS, added her perspective. Ross Andrew, an official of OPS (who has also been a classroom teacher, vice-principal and principal), explained the objectives of OPS and some of the organizational changes which have been undertaken in recent years. As it turned out, the evidence was very similar to that before the Board in *York No. 2*, where, as here, the respondent Board of Education objected when an established teacher organization (OSSTF) sought certification as bargaining agent for a unit of occasional teachers. There, too, the Board of Education asserted that an “affiliate” or “branch affiliate” under Bill 100 was not a “trade union” entitled to invoke the certification procedures in the *Labour Relations Act*, because it included “managerial personnel” among its membership. There, as here, the Board heard evidence about these allegedly “managerial” responsibilities.

19. Mr. Hyland has been a superintendent for twelve and a half years. Before that, he held positions as a classroom teacher (19 years), vice-principal (3 years) and principal (4 years). There are three superintendents. Above them in the hierarchy is a superintendent of operations and a superintendent of programmes. They, in turn, report to the director of education who is the respondent’s chief administrative officer. All of the administrative officials are ultimately responsible to the elected Trustees of the Board of Education. This ultimate authority of the elected Board is recognized in the collective agreement covering contract (i.e., regular class-room) teachers, which is negotiated between the respondent on the one hand and FWTAO and OPS on the other. Article IV, the “Management Rights” clause reads, in part, as follows:

4.01 The Branch Affiliates recognize that the Board has the right, duty and responsibility to provide, operate and manage its elementary schools in the City of Windsor, according to the laws of Ontario and subject to the express provisions of this agreement, so long as these provisions are not inconsistent with any law of Ontario.

• • •

4.03 The teachers further recognize the right and duty of the Board to appoint, demote, discharge and discipline teachers for just cause. A permanent teacher who has been demoted, discharged or otherwise disciplined may exercise the right to lodge a grievance in accordance with Article XVII of the collective agreement.

20. Mr. Hyland told the Board that the elementary school system encompasses approximately 40 schools, employing approximately 650 classroom teachers. All of the schools have a principal and (depending upon size) about 22 of them have a vice-principal as well. All of the principals and vice-principals are members of one or the other of the branch affiliates and are thus eligible to hold executive office in those teacher organizations. Mr. Hyland was uncertain about the details, but he was sure that, at various times over the years, principals and vice-principals had held executive positions in the affiliates. This aspect of his evidence was not contradicted by the applicant and we are prepared to find that from time to time principals have held such positions. Indeed, one would expect that the very qualities of mind and leadership which make for an effective principal, would lead to an executive role within the professional association if a principal chose to pursue that organizational interest.

21. Some principals teach. Some do not. It depends upon the size of the school, and the extent to which their time is consumed by administrative responsibilities. Those responsibilities are specified in section 236 of the *Education Act*, and sections 12 and 13 of Regulation 262 made under that Act:

Education Act

236. It is the duty of a principal of a school, in addition to his duties as a teacher,

- (a) to maintain proper order and discipline in the school;
- (b) to develop co-operation and co-ordination of effort among the members of the staff of the school;

• • •

- (e) to prepare a timetable, to conduct the school according to such timetable and the school year calendar or calendars applicable thereto, to make the calendar or calendars and the timetable accessible to the pupils, teachers and supervisory officers and to assign classes and subjects to the teachers.

Regulation 262

12(3) In addition to the duties under the Act and those assigned by the board, the principal of a school shall,

- (a) supervise the instruction in the school and advise and assist any teacher, in co-operation with the teacher in charge of the organizational unit or program in which the teacher teaches;
- (b) assign duties to vice-principals and to teachers in charge of organizational units or programs;
- (c) report to the board or to the supervisory officer in writing, on request, on the effectiveness of members of the teaching staff and give to a teacher referred to in any such report a copy of the portion of the report that refers to the teacher;
- (d) recommend to the board,
  - (i) the appointment and promotion of teachers, and
  - (ii) the demotion or dismissal of a teacher whose work or attitude is unsatisfactory, but only after warning the teacher in writing, giving the teacher assistance and allowing the teacher a reasonable time to improve;

13(1) A board may appoint one or more vice-principals for a school.

(2) A vice-principal shall perform such duties as are assigned to the vice-principal by the principal.

(3) In the absence of the principal of a school, a vice-principal, where a vice-principal has been appointed for the school, shall be in charge of the school and shall perform the duties of the principal.

## II

22. Occasional teachers fill in when regular classroom teachers are absent. Work



opportunities arise only when the regular classroom teacher is unable to perform his/her regular duties. The actual allocation of work is quite routine and mechanical - probably because most elementary school teachers (unlike secondary school teachers) do not restrict their teaching to particular subject areas.

23. The respondent maintains a regular list of approximately 80 occasional teachers who have indicated their willingness and availability to work in its elementary schools. The list is no guarantee of any particular volume of work, but over the years a pool of 80 occasional teachers has been sufficient to both meet the respondent's needs, and generate a sufficient number of work opportunities to keep the occasionals active and interested. In addition, there is a subsidiary list of about 100 qualified individuals who could be added to the active list if some of its members became unavailable.

24. Mr. Hyland testified that it was his responsibility to interview candidates, maintain the permanent supply list, and, when vacancies arose, transfer interested applicants to the active list. He said that, for the most part, he had inherited the current list from a former supervisory officer but, when vacancies occur, he checks teacher resumes and conducts interviews to decide who should be added. A recommendation from a principal would be a strong factor in an applicant's favour. On relatively rare occasions, Mr. Hyland may decide to delete someone from the list because of adverse reports about his/her classroom performance. He could not recall any specific instance but suggested that this might have occurred perhaps four times in the last two years. Ordinarily, he said, any problems which had arisen were regarded merely as instances of personality conflict or poor communication and that he tried to step in to "heal" the situation. If a local principal was adamant, he would merely ensure that the particular supply teacher did not return to that school.

25. For the most part, the respondent's employees are not involved in the selection of which occasional will fill such work assignments as may arise. The respondent has "subcontracted" the allocation of these work opportunities to a local telephone answering service which has been provided with the telephone numbers of the persons on the active occasional list together with their particular specialties (art, music, library, etc.) and the school(s) where they prefer to work. An employee of the answering service simply goes down the list, telephoning prospective candidates, until he/she finds one who is willing to undertake the particular work assignment. The supply teacher continues to report for work until advised by the answering service (or perhaps the school) that his/her services are no longer required because the regular classroom teacher will be returning.

26. In this scheme, the principals have little influence in the selection of the pool from which occasionals working in their schools are drawn, and virtually no influence over which occasional teachers will be called upon to fulfill these short-term teaching assignments. Nor is there any evidence that the principals or vice-principals have any influence over the terms and conditions of employment for occasional teachers. They do not prescribe or recommend salary or benefit levels and, of course, such items as bonuses, performance allowances, merit pay, or annual increases are irrelevant for this group of casual employees. Indeed, we should note that the collective agreement covering the regular classroom teachers also purports to establish the formula on which elementary occasional teachers will be paid. Article 5.02 reads:

5.02 Where a teacher, qualified to teach in the elementary schools of Ontario according to the Ontario Statutes, is employed as an occasional teacher for a period of more

than ten (10) consecutive days on the same assignment, the salary of the teacher shall be pro-rated on the salary grid according to his/her category/experience placement. For periods of employment up to and including the ten (10) days, the daily rate of salary paid shall be 1/220 of the minimum of Category 1(D) per day for teachers not holding a degree and 1/220 of Category 4(A1) for teachers holding a degree.

Whatever the merits of the respondent's position that the branch affiliates are not legally entitled to represent occasionals, it is interesting that the respondent was prepared to negotiate with those same branch affiliates about what must necessarily be a critical term of employment for the occasionals.

27. The position of occasionals hired for longer periods of time (for example, to replace someone on maternity leave or with a serious illness) may be a little different. In their case, the principal may have more input in the selection process. Apparently the practice is for the superintendent to pre-select four or five candidates who are then interviewed by the principal or vice-principal, and the superintendent himself if he has time. A recommendation is then sent up the administrative hierarchy, ultimately to the Board of Education which makes the final determination. Mrs. Kelk added that in one instance her recommendation was based substantially upon the assessment of the teacher to be replaced. She forwarded that recommendation to Mr. Hyland who accepted it.

28. Principals would have a role co-ordinating and directing the work of their own school clerical staff - subject to the respondent's overall personnel policies. It is not clear to what extent a principal can influence secretarial salaries or promotions, however, it is fair to assume that a favourable recommendation would carry considerable weight if there was some question whether a secretary should move from one job or salary level to another. Without more detail about how secretaries are paid we cannot say more except that it does not appear that the principal has much to say about the salary scale paid to the respondent's clerical staff. It appears that there has not been the occasion for disciplinary action or demotions, etc. but again, it is fair to assume that the principal would be consulted. However, Mr. Hyland indicated that on these matters the respondent's personnel department would be directly involved since it is responsible for employer-employee relations matters.

### III

29. Despite the responsibilities of principals spelled out in the *Education Act* and their undoubted duty (as Mr. Hyland put it, to "co-ordinate the human and physical resources of the school") the evidence establishes that the principal has no independent authority to hire, fire, or discipline *contract teachers* - although, as the person with the most immediate knowledge and responsibility for the workings of a particular school, the principal's opinions or recommendations will obviously be accorded some weight. However, given the legislative framework, professional context, and collegial mode of decision-making, it is not easy to assess the independent significance of the principal's role. As one might expect, the relationship between highly trained professionals is not the same as that of superiors and subordinates in an industrial plant. In this professional milieu, problem-solving, peer-review, counselling, and professional development replace the more overt exercise of authority found in the more traditional employer-employee relationships typically governed by the *Labour Relations Act*.

It is difficult to apply the same “rules” or “approaches”, and one must remember that the Legislature has chosen not to do so. In argument, the respondent stressed the supposed anomaly of including “managers” and “managed” in the same unit and argued that a “union” could not properly include both groups in its ranks. However, even if we adopt the respondent’s labels (“managers” and “managed”), it is obvious that the Legislature has assigned them both not only to the same collective bargaining organization, but also to the same collective bargaining unit - without (on the evidence before us at least) any calamitous collective bargaining results.

30. Clearly, principals and their delegates, vice-principals, perform important functions concerning the ongoing administration and running of the elementary schools. As the system’s first level of administration, the principals (and vice-principals) have an important role to play in determining the organization and performance of the teaching complement - although, their role is part of a much broader process of consultation, professional assessment, and collegial decision-making. The principal is responsible for administering the school, identifying problems and ensuring that they are rectified. In the case of new hires, principals and/or vice-principals typically interview those candidates forwarded to them by other officials of the respondent and make recommendations which are passed on to the superintendent(s), the superintendent of operations, and ultimately to the elected Board itself. However such activities are much less common in recent years. Declining enrolments mean a reduction in the total complement, fewer “new hires”, and a shift in focus to how to preserve the jobs of the qualified teachers already on staff. There is less concern about the progression of a teacher from probationary to permanent status which could be dependent upon a favourable evaluation by the principal and a superintendent which is forwarded to the Board. Mr. Hyland testified that, in any event, the progression from probationary to permanent status is virtually automatic, because a teacher would not have been hired in the first place unless she/he was qualified. In the case of a promotion from regular classroom teacher to vice-principal, principals will typically participate on the interview team whose “consensus” recommendation will be forwarded to the superintendent of operations and then to the Board for ratification. Mr. Hyland testified that a short list would be forwarded to the Board together with an assessment by the superintendent of operations, based on a “point system”, taking into account such factors as preparation, education, leadership qualities and so on.

31. If the failure of a probationer to make full contract status is rare, it appears that a discharge for cause is even rarer. The discharge of a teacher is a serious matter, and there was no specific evidence before the Board to indicate that a disciplinary discharge had ever occurred or the circumstances in which a disciplinary discharge would inevitably occur. Moreover, this would clearly be a decision of the Board of Education which would be based not only upon the opinion of the local principal and the recommendations of supervisory officers, but also upon the advice of such other professional employees as the Board might wish to consider. Mr. Hyland indicated that the local principal would not be present at any Board meeting debating such issue, although the supervisory officers would be, and the Board would have a written opinion from the local principal about the problem, if not the propriety of a discharge. There was no evidence of the kind of direct disciplinary discharge which regularly comes before arbitrators in both the private and public sectors. In fact, there is no direct evidence of anything which could be considered disciplinary in a standard industrial relations sense.

32. The terms of the parties’ collective agreement underline the ambivalent position of



principals in the statutory collective bargaining scheme. In accordance with Regulation 12(3)(f), the principal may recommend the demotion or dismissal of a teacher whose work or attitude is unsatisfactory, and in accordance with Article 5.03 of the collective agreement, *supra*, a Board may, on a principal's recommendation, withhold a teacher's annual salary increment. There is no evidence that this has ever happened. There is no evidence that anyone has ever grieved about a principal's decision, opinion or assessment. Principals do not handle or respond to grievances on behalf of the respondent; however, as members of the bargaining unit they can *file* grievances asserting a breach of the collective agreement.

33. In summary then, there is virtually no concrete evidence of employer-employee or collective bargaining friction flowing from the principal's role despite ten years under Bill 100 and a long history of hiring occasionals.

#### IV

34. Ross Andrew's evidence focussed on the historical background of OPS. It was incorporated by letters patent in 1921 and currently has the following objects:

##### Article III - Objects

The objects of the Federation shall be:

- 1 To promote and advance the cause of education.
- 2 To promote a high standard of professional ethics.
- 3 To raise the status of the teaching profession.
- 4 To arouse and increase public interest in educational affairs.
- 5 To promote, safeguard and advance the interests of teachers.
- 6 To secure the best possible terms and conditions of employment for teachers, in order to ensure quality education.
- 7 To cooperate with other organizations throughout the world having the same or like objects. (1981)
- 8 To gain greater control of teacher education and certification.
- 9 To promote as a long-term goal the unification of all teachers in the Province of Ontario into a single unified body without affiliates. (1983)
- 10 To promote the provision of universally accessible daycare. (1983)
- 11 To organize and represent occasional teachers teaching in public elementary schools in Ontario. (1984)

35. Whether or not OPS is a "trade union" under the *Labour Relations Act*, it is undoubtedly an organization of professional *employees* who have joined together, *inter alia*, for the advancement of their professional and employment interests. OPS grew in tandem with the other teacher organizations which after 1975 acquired the status of statutory bargaining

agents under Bill 100. At the present time, OPS has a total membership of between 16,000 and 16,500 teachers. Of these, about 14,000 are male teachers, teaching in public elementary schools, and represented by OPS for collective bargaining purposes by virtue of Bill 100. In addition, OPS numbers among its membership about 1,500 women (ordinarily represented for collective purposes by FWTAO), and about 200 occasional teachers of both sexes.

36. According to Ross Andrew, OPS has voluntarily admitted women into membership since 1972 - that is, well before Bill 100 was enacted and gave formal legislative recognition to collective bargaining divisions based upon sexual differences. As early as 1944, the Legislature created the Ontario Teachers' Federation (OTF) as an umbrella organization for the five affiliates later designated for collective bargaining purposes under Bill 100.

37. Mr. Andrew indicated that sex is no longer an impediment to membership in OPS. In fact, the only requirements are that one possess a teaching certificate, be employed in an educational capacity, tender the required fee, and find a "district" willing to accept the new applicant. OPS' long-term objective is to unite all elementary school teachers in a single organization. Apparently FWTAO does not share that goal or desire.

38. According to Mr. Andrew, all of the members of OPS have approximately the same duties, responsibilities and privileges; but there are obviously different obligations imposed by statute. Mr. Andrew explained that, as a practical matter, it would be foolish for one designated collective bargaining agency to duplicate the services imposed, by statute, upon another one. Thus, OPS admitted into membership women elementary school teachers (like Mrs. Kelk) who are represented for collective bargaining purposes by FWTAO, but would generally decline to provide those services already provided by their own statutory collective bargaining agent. For example, during a strike authorized by FWTAO, OPS would not provide strike pay to those of its members who were also, by statute, required to belong to FWTAO and would therefore expect to receive support from FWTAO in any collective bargaining dispute with their employer. However, OPS does provide counselling, assistance in professional difficulties, professional development, counselling and access to the QECO system whereby teachers' qualifications were evaluated for salary rating purposes; and would provide service in professional relations disputes if FWTAO did not do so. According to Mr. Andrew, there was no institutional discrimination between men and women or between occasional teachers and others. Voluntary members, such as occasional teachers, can hold office, participate in OPS programmes, and engage fully and without restraint, in the institutional life of the organization. At the time of hearing, OPS had a woman president.

### Are Principals Really "Managerial"?

#### I

39. Although framed with reference to particular provisions of the *Labour Relations Act* (sections 1(3)(b), 13, 48, 64, and 106(2)), the first branch of the respondent's argument is based upon the premise that "managers" and "managed" cannot be part of the same organization. If they are, the respondent argues, that organization cannot be a "trade union"

under the *Labour Relations Act*. Because OPS numbers among its members persons (principals) said by the respondent to be “managerial” so that they would not be “employees” if the *Labour Relations Act* applied to them, the respondent asserts that OPS should not be considered to be an “organization of employees” entitled to seek bargaining rights for occasional teachers. But are principals “managerial” in the collective bargaining sense envisaged by section 1(3)(b)?

40. Of course, the whole question is somewhat artificial since the Act does not apply to principals or contract teachers at all; moreover, apart from that collective bargaining statute which does not apply, there is no doubt that OPS is an “organization of employees formed for purposes that include collective bargaining”. Teachers and principals are employees at common law and under the applicable statutes governing their employment relationship. OPS is an organization of such employees. It has engaged in collective bargaining both before and after the passage of Bill 100. On a purely literal reading of the words of section 1(1)(p), OPS meets the test (leaving aside for the moment the fact that most - but not all - of its members are employees to whom the Act does not apply).

41. On a visceral level, however, the respondent’s argument has some attraction, for there is no doubt that collective bargaining is premised upon an arm’s length relationship between employers and management. Under the *Labour Relations Act*, sections 1(3)(b) and 106(2) give the Board authority, for collective bargaining purposes, to preserve that distinction. But acceptance of those propositions does not mean that we would find that principals are managerial if section 1(3)(b) were applied to them.

## II

42. Section 1(3)(b) has been in the statute in its present form since 1957 when, following the decisions of the Supreme Court in *Re OLRB, Bradley et al. and Canadian General Electric Co. Ltd.*, [1957] O.R. 316 (C.A.) reversing [1956] O.R. 437 (O.H.C.), the Legislature amended the section to clarify the Board’s jurisdiction and authority. The “old” wording read:

(3) For the purposes of this Act no person shall be deemed to be an employee...

(b) who is a manager or superintendent or who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

It now reads:

(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

• • •

(b) who, *in the opinion of the Board*, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

43. This change in statutory language did not change the basic problem to which section 1(3)(b) is addressed. But it did make it clear that it was the Board’s opinion which was determinative, and that in construing or applying section 1(3)(b) the Board should take into



account collective bargaining considerations and its own experience. Indeed, if there were any residual doubt that this is the approach the Board should take in interpreting the *Labour Relations Act*, it has been dispelled by the recent decisions in *Wells Fargo Armcar Inc.*, [1981] OLRB Rep. July 1046; judicial review dismissed (1982) 36 O.R. (2d) 361 (Ont. Div. Ct.). There, the Board held that persons who wore uniforms, carried sidearms, guarded their employer's property, and were called "guards", were not "guards" under the *Labour Relations Act* because they did not exercise functions vis-a-vis other employees so as to bring them within the mischief to which section 12 of the Act is directed. The Divisional Court agreed. The words in the statute must be interpreted in a collective bargaining context, to advance the goals in the Preamble, and make "labour relations sense" of the process.

44. What is the "mischief" to which section 1(3)(b) is directed? The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit do not find themselves with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members of the bargaining unit. Section 1(3)(b) is based on the notion that neither the trade union nor the employer and its management team need be concerned that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] 1 Can. LRBR 1 at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decision can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification which its interest diluted by participation in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.

Similar observations have been made by the Ontario Board in *Toronto East General and Orthopaedic Hospital Inc.*, [1974] OLRB Rep. Oct. 671:

4. The section 1(3)(b) exclusions represent a legislative recognition that viable collective bargaining requires that employers be able to effectively participate in that adversary process known generally as labour relations. It was felt that effective participation in the labour relations process - a process that centres on collective bargaining - requires some assurance of security in the ranks of management. Moreover, the inclusion of independent decision-makers, particularly decision-makers in the realm of labour relations, in the bargaining unit might compromise the judgment of such individuals. But the section has not been an easy provision to apply. Because of the complexities of the work environment and the need to balance the rights of employees to join and fully participate in a trade union against the employer's interest in maintaining its labour relations, the Board has had to make very difficult judgments in drawing the line that demarcates management from the bargaining unit; (See generally *The Corporation of the District of Burnaby and CUPE Local 23* [1974] CAN. LRBR 1 (B.C.); Reed, White-Collar Bargaining Units under the *Ontario Labour Relations Act* (1969) p.27. For the United States approach to these exclusions see Note, *Labour Law - The National Labour Relations Board Redefines and Restricts the Scope of Managerial Employee Classification* (1973) 26 Vand. L. Rev. 850). But because *The Labour Relations Act* must be interpreted as an Act in the public interest, it is incumbent on persons who seek to exclude employees from the scheme of the Act to prove that such persons exercise managerial functions. (See *Bakery & Confectionery Workers I.U.A. v. Salmi* 56 D.L.R. (2d) 1973).

45. The *Labour Relations Act* itself does not contain a definition of the term "managerial functions", nor are there any criteria to guide the Board's interpretation. The task of developing such criteria has been left to the Board itself, and in recognition of the fact that the exercise of "managerial functions" can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. An especially important question from a collective bargaining point of view is the extent to which so-called "managers" make decisions which significantly impact upon the economic lives of their fellow employees, thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases, or discipline employees, are all manifestations of managerial authority which could produce collective bargaining problems when exercised in respect of persons within the same bargaining unit. Indeed, this Board (but not others in Canada - see *British Columbia Telephone*, 76 CLLC 16,015 at page 467) has often extended the ambit of section 1(3)(b) beyond the actual or ultimate decision-maker to those who make what the Board has called "effective recommendations" which materially affect the conditions of employment of those supervised. In framing the test in this way, the Board has not ignored the real distinction between a person recommending or influencing a decision, and the one ultimately making it. Supplying information or "input" is not the same as deciding, and a person who does only the former has a much weaker claim when it is suggested that he is exercising "managerial functions".

46. Unfortunately, while it is easy to describe the problem and express the Board's approach in a general way, it is frequently very difficult to draw the line - particularly as collective bargaining extends to white-collar and professional employees where the Board has to deal with increasingly complex job hierarchies and reporting structures. Collective bargaining first emerged as a response by blue-collar workers to a perceived inequality of bargaining power and the basic statutory framework was developed in the 1940's and 1950's in response to such concerns. Since then, however, collective bargaining has extended beyond mine and mill to hospitals, government organizations, universities, and even the scientists who worked on the famous retractable arm on the NASA space shuttle: see *Spar Aerospace*

*Products Ltd.*, [1979] OLRB Rep. July 700. For these emerging groups the old tests did not work very well. The “effective recommendation test” was particularly difficult to apply when the “recommendation” involved rendering a professional judgement based on professional training and responsibility.

47. Many of these problems were first explored in the health care industry where large groups of professional, paramedical, technical, and unskilled employees must work together in an institutional setting. In the case of professionals, such as registered nurses, it quickly became apparent that they had a special relationship with each other, with their employer, and with employees at lower levels of the job hierarchy. They did things in their professional capacity which would typically be done by “management” in an industrial plant. As the Board noted in *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84 at paragraph 16:

All of these cases, (as well as the nursing home cases referred to earlier) involved individuals who, in varying degrees were performing various supervisory or coordinating functions which historically or in other contexts might have been associated with managerial status. Such functions included: coordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, scheduling, arranging for a “fill in” if a member of the team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion on the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical break-downs on “off-shifts”, attempting to ensure compliance with the institutional “rules” laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, coordinating, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be “managerial functions”. They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where “reporting” is part of an individual’s professional responsibilities and the actual decisions are made by someone else (usually an “administrator” who may or may not be a professional himself) then the “effective recommendation test” referred to above must be carefully applied. (For specific comment on employee evaluations and the need for clear evidence of their impact see: *Toronto East General Orthopaedic Hospital*, *supra*, at 16; *Ajax and Pickering Hospital*, *supra*, at 17; *Mascassa Lodge*, *supra*, at 19-10 [sic]; *St. Peters Hospital*, *supra*, at 7-8; *Regional Municipality of Halton*, *supra*, at 10; and *Sudbury and District Health Unit*, Board File No. 2055-79-M decision released March 11, 1981, unreported at paragraph 13.)

The Board also noted that in applying section 1(3)(b) to these complex job hierarchies or professional groupings, it was defining access to collective bargaining. Rights guaranteed by section 3 should not be limited in the absence of hard evidence of the mischief section 1(3)(b) is intended to avoid:

12. Persons who exercise skills which have been acquired through years of training or experience will necessarily have considerable influence over those who are less trained or experience. The most highly trained or skilled employees will routinely supervise the work of others, and it is part of their normal job functions to train and direct such persons, and to instill good work habits. Frequently, it is only the most senior or experienced employees who will fully understand the technical requirements of the job and, accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. It is part of their job to ensure that appropriate techniques are being applied and that the work is being done properly. Their expertise and technical judgement



are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in coordinating and directing the work of other employees - but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with lower level of skills, education or training (in the case of "master craftsmen", these would include "journey-men", "apprentices", and assorted "helpers"; and in the case of "professionals", a variety of "technologists", "technicians", assistants and aides). To hold that persons with higher levels of education or training (whether acquired on the job or otherwise) exercise "managerial functions" with respect to lesser skilled or unskilled individuals at lower levels of the job hierarchy would be tantamount to saying that the Act has no application to much of highly trained and educated work force which is characteristic of the emerging high technology industries. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that the focus should be upon those functions which have a direct and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases.

48. *Oakwood Park Lodge* was a case in which a nursing home operator claimed that his entire complement of registered nurses was "managerial" because, to ensure the delivery of proper care, they had a degree of responsibility for supervising the activities of various registered nursing assistants, health care aides, orderlies, and so on. That was a plausible position, but after an extensive review of the facts, the purpose of 1(3)(b), and the pattern of collective bargaining in the industry (which was by then well established), the Board concluded that the functions performed by the nurses were part of their professional responsibility and they should not be considered part of the employer's "management". That decision was taken by the employer to the Divisional Court, which declined to intervene (see *Medi-Park Lodges Inc. carrying on business as Oakwood Park Lodge v. Ontario Nurses' Association et al.*, 82 CLLC 14,016). The Court held that the determination that the registered nurses did not exercise managerial functions was a finding of fact within the Board's exclusive jurisdiction, but went on to note that:

In our view, the reference to unionization in other facilities of the applicant, as well as the consideration of developing themes in relation to the role of professionals in collective bargaining are matters within the expertise of the Board which it can consider in evaluating the case before it.

In our view, we are entitled to take into account "developing themes in relation to the role of professionals in collective bargaining" and the way principals have been dealt with where collective bargaining is already established.

49. We have gone on at such length because of the respondent's forceful assertion that its principals should be regarded as "management". Should they?

## II

50. What is absolutely striking about the evidence in this case is the *absence* of any

regular or material involvement by the principal in decision-making which significantly impacts upon the employment relationships or terms or conditions of employment for occasional or even contract teachers. We find ourselves in the same situation as the Board did in *York No.2*. At paragraph 28, the panel observed:

28. What is interesting about this evidence is the absence of a clear line between “superiors” and “subordinates” - “management” and “labour” - of the kind which one might expect to find in a more traditional industrial setting. Here, it is very difficult to determine precisely how much independent influence the principal or vice-principal actually has. Insofar as contract teachers are concerned, the evidence reveals little of the industrial relations conflict which section 1(3)(b) was designed to avoid (see *Corporation of the District of Burnaby* [1974] 1 Can. LRBR at p.3; and *Ottawa General Hospital*, [1984] OLRB Rep. Sept. 1199). But perhaps that is not so surprising. In this professional context, the members of the OSSTF bargaining unit are all highly trained and responsible persons who are largely self-motivated, capable of exercising independent judgment, and requiring little external direction in the performance of their regular duties. Such direction as is necessary can be generated internally through group discussion, evaluation by peers, or “collegial” modes of decision-making, and one would not expect the managerial structure appropriate for professionals to be the same as that for manual workers. Professional employees will have a special relationship with their employer and with their fellow professionals.

29. The evidence establishes that the principals and vice-principals do not exercise much direction or control over the occasional teachers - not because they do not have the ultimate authority to do so, but rather because the occasion does not arise. Arranging for the employment and supervision of occasional teachers is a minor aspect of the principals’ (or vice-principals’) role and, on the evidence, the critical decisions for most occasionals are made by the department heads. For the most part, it is the department heads who determine who will be called and it is the department heads who make a professional assessment about the abilities of particular occasional teachers. The exercise of such authority, however, is so attenuated, sporadic and diffused that it is not very much different from the kind of authority exercised in an industrial context by senior or regular employees who may be called upon to express an opinion on the abilities of students, probationary employees or temporary employees with whom they work from time to time. Such recommendations are likely to be given considerable weight with respect to these casual employees, not because those expressing them have “managerial authority”, but because the recall of one casual as opposed to another does not matter very much, so long as they display a minimum level of competence. The persons with whom they work directly are in the best position to express an informed opinion.

30. Peer review or evaluation is not uncommon in a professional setting, and is not, in itself, a managerial function within the meaning of section 1(3)(b). In a hospital context, a registered nurse might be called upon (and under an obligation) to express an opinion on the professional judgment or competence of a fellow nurse (full-time or casual), or an RNA. The expression of such opinions would not remove her from the bargaining unit or raise questions about the status of the Ontario Nurses’ Association (see: *Ottawa General Hospital*, *supra*, and *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84). In a university setting, appraisal by professional peers is institutionalized, and it is not at all unusual for “tenure committees” composed of various members of the academic staff to determine or recommend whether other academics will be promoted or given tenure, or for a committee of professors to interview prospective colleagues and make an effective recommendation as to which of several candidates should be hired. This is not to deny that professional employees may also exercise “managerial functions” within the meaning of section 1(3)(b). It is simply that there must be a careful appraisal of the professional context. The adversarial model, conflict of interest rationale, and “two-sides approach” to collective bargaining is not easily applied to a group of professionals - as the Legislature undoubtedly recognized when it determined that principals and vice-principals should be included in the same bargaining units as their fellow teachers.

31. For these reasons, we have had some difficulty deciding how section 1(3)(b) would be applied to the relationship between principals and contract teachers if they were covered

by the *Labour Relations Act*, and how it should be applied to the relationship with occasional teachers who are covered by the Act. It has been difficult to pinpoint just where managerial authority resides. . . .

51. Here, in practice, principals do not hire, fire, promote, demote, or evaluate occasionals. Those concepts have virtually no application to casual employees. The wages paid to the occasionals appear (paradoxically) to be determined by a formula prescribed in a collective agreement between the applicant and the respondent. There is no evidence that the principals have any role to play in determining the occasionals' terms and conditions of employment. When work opportunities arise, the selection of who will perform the work is done by a telephone answering service which simply goes down a pre-established list which takes into account the occasionals' own preferences and availability. Access to that list and therefore to potential work opportunities is controlled by Mr. Hyland, who has the responsibility to establish a sufficient pool of competent supply teachers to meet the respondent's needs. Even a principal's dissatisfaction with an occasional's performance or personality does not result in his being struck from the list; for, according to Mr. Hyland, he first tries to "heal the situation" and if he cannot, he merely ensures that the individual is not sent to that school. Any actual deletions from the list are done by Mr. Hyland and are extremely rare - as one would expect if, in the first instance, there was a proper assessment of the occasionals' qualifications. Even in the case of long-term occasionals where the principal's opinion appears to be more important, the selection is done jointly from a group pre-screened by Mr. Hyland and the recommendation is sent "up the line" ultimately to the elected board of education. The evidence does not indicate how many long-term occasionals there are or the nature of the relationship between the principal and these long-term supply teachers. Again, it would appear that the terms and conditions of employment are fixed, promotions or demotions are irrelevant, and that a favourable evaluation would, at its highest, result in a long-term occasional being given favourable consideration should a contract position become available in the bargaining unit of which the principal himself/herself would be a member. There is no evidence that a principal or vice-principal has ever had a role in terminating a long-term occasional or ensuring that such individual was never rehired on a long-term basis.

52. The principal's authority over regular contract teachers is equally attenuated. That role is described above and need not be repeated. Those facts do not cry out the mischief to which section 1(3)(b) is directed. On the contrary. *Hypothetically*, a probationary teacher's passage to permanent status can depend upon the favourable recommendation of the principal. But with declining enrolments, there have been few new hires and it is admitted that the transition to full-time status is virtually automatic. The discharge of a teacher, for cause, is a rare and traumatic event involving principals, colleagues, supervisory/administrative staff and ultimately the Board of Trustees. The principal may make a recommendation, but it is not obvious that it is the critical or effective one. Performance evaluation does not in practice (at least on the evidence) result in a disciplinary response or even, it seems, much likelihood of a financial penalty. It is treated as a problem of training and professional development which does not necessarily impair a teacher's career advancement. As Mrs. Kelck testified, if she discerned a problem she would call in senior teachers and consultants to assist the teacher in difficulty.

53. Finally, the Legislature really must have the last word. Whatever this Board might think, the Legislature has clearly decided that principals and teachers can be in the same bargaining unit and be members of the same bargaining agent without causing the problems



which section 1(3)(b) is designed to avoid. That issue was apparently a matter of debate before the Matthews Commission reviewing Bill 100 and both the Commission and the Legislature decided that principals and contract teachers could be and should be included in the same bargaining unit and represented by the same bargaining agents. That legislative choice was also the subject of comment in *York No. 1* at paragraph 60:

60. Before leaving this topic, we observe that the characterization of principals' duties for collective bargaining purposes has been the focus of attention on more than one occasion. The Reville committee considered whether or not principals should be excluded from bargaining units under teacher/school board collective bargaining legislation. The question was a difficult and controversial one. There were strong opinions on both sides of the question; the committee members could not agree on an answer. One member felt principals should be and were managerial, and should be excluded from any bargaining unit. The majority accepted that principals were teachers first and foremost and should be able to join with teachers in collective bargaining with boards, but felt they should have the option of forming their own bargaining units if they wished. The legislature ultimately included principals and vice-principals in the teachers' bargaining unit. It cannot be assumed, in the circumstances or at all, that in taking that approach the legislature was oblivious to this important and difficult question and the debate it had engendered. On the contrary, it should be assumed that the provisions of Bill 100 represent the legislature's conscious assessment that the duties and responsibilities of principals are not so "managerial" as to require their exclusion from a bargaining unit of contract teachers represented in bargaining by branch affiliates within the meaning assigned to that term by the legislation. Indeed, the same legislature which enacted paragraphs 1(1)(p) and 1(3)(b) of the *Labour Relations Act* also enacted Bill 100, assigned a collective bargaining role to branch affiliates of OSSTF, decided that principals fell on the employee side of the managerial line, and directed OSSTF's branch affiliates to represent units of contract teachers, including principals. This suggests that the legislature considered OSSTF to be "an organization of employees formed for purposes that include the regulation of relations between employees and employers", and reinforces our conclusion that OSSTF fits within the definition of "trade union" under the *Labour Relations Act* even assuming, without deciding, that from the perspective of the *Labour Relations Act* principals might be regarded as exercising managerial functions. . . .

54. The evidence before us confirms the wisdom of that legislative choice, since the kind of "mischief" that section 1(3)(b) was designed to avoid does not seem to have materialized here. That being so, and taking a purposive view of section 1(3)(b), on the evidence before us we would not be inclined to conclude that principals exercise "managerial functions" even if section 1(3)(b) applied to them. But what if we were wrong?

Would it matter whether principals are managerial? Does a trade union cease to be one if it admits managerial personnel into membership?

55. Is it legally significant that an employee organization includes among its members some relatively small proportion who exercise managerial functions and so could not be regarded as employees under the *Labour Relations Act* or related collective bargaining legislation? Does its status as a trade union depend upon maintaining its purity? Does a union lose its status and ability to represent employees because it admits to membership those who are not? These questions were canvassed at considerable length in *York No. 1* and *York No. 2*, and, in the interest of economy of exposition, we were tempted to simply indicate the numbered paragraphs in those decision with which we are in agreement. But to do that, would mean that a lay reader, without access to a law library or other source of the Board's reports, would not know what the Board is referring to or has taken into account. Since this is the first case in which OPS has tried to establish its status, and other cases and parties may be

interested in or influenced by it, we have opted (at the risk of prolixity) to quote extensively from these earlier Board decisions.

56. *York No. 1* involved an application for certification in which OSSTF which sought to represent certain teachers employed by the Board of Education for the City of York at *Humewood House*, a residential facility operated by the Humewood House Association and licenced as a children's residence under the *Children's Residential Services Act*. A key, and ultimately the determinative issue in that case was whether those teachers were employees under the *Labour Relations Act* or teachers as defined in Bill 100. But the Board also considered the respondent's argument that OSSTF was not a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* because its membership included principals. The employer relied upon their administrative duties prescribed by the *Education Act* and the statutory obligation to be a member of OSSTF.

57. The Board reviewed a number of cases commencing with *Hydro-Electric Power Commission of Ontario* ("HEPCO"), [1971] OLRB Rep. Aug. 501. Having done so, the Board made the following comments at paragraphs 56-61 of its decision:

56. The *HEPCO* case held that the phrase "organization of employees" must be read as "organization of employees only", having regard to the precision with which the meaning of the word "employee" is limited by paragraph 1(3)(b) of the Act. That reading of the language of paragraph 1(1)(p) would exclude from trade union membership not only managerial persons, who would be considered "employees" but for the deeming provision of paragraph 1(3)(b), but also persons who are not in any sense of the word anyone's "employee". If that were the intention of the Legislature, then why it did it so carefully use the "person" in section 3 when describing those who may join and participate in trade unions? The use of that word must at very least contemplate trade unions having members who are not "employees" because they are unemployed: see *Ottawa General Hospital*, *supra*, at paragraphs 24 and 26. While the language of section 3 of the Act does not create for managerial persons a protected right to join and participate in the activities of a trade union, that language is clearly inconsistent with an interpretation of section 1(1)(p) which requires that the phrase "organization of employees" be read as "organization of employees only". It is noteworthy that none of the decisions which favour the "employee only" interpretation of section 1(1)(p) makes any reference to section 3 of the Act.

57. The *HEPCO* "employee only" interpretation of paragraph 1(1)(p) not only fails to take the language of section 3 into account, it also comes into conflict with characteristics of organizations commonly thought of as trade unions. We have already observed that craft unions tend to have "managerial" members, and that an "employees only" definition would prevent the unemployed from joining trade unions. It must also be recognized that trade unions are often employers themselves; indeed, trade union employees can be and have been the subject of certification applications. In defining a bargaining unit of trade union employees, paragraph 1(3)(b) comes into play and those who act on the union's behalf in hiring, firing and directing the work of its employed staff will be excluded as "managerial". If paragraph 1(1)(p) means what *HEPCO* says it does, then either those managerial persons would have to give up their union membership, or the trade union would have to give up its managers or its employees or forfeit its "status". This is an absurd result.

58. It is important to note also that the *Labour Relations Act* expressly defines "trade union" to include provincial, national and international trade unions. Many such organizations exist. Some existed, as OSSTF did, before the Ontario legislature enacted any collective bargaining legislation; those organizations are not disqualified as trade unions by the fact that their founders were not persons then covered by such legislation. A trade union may function in a number of jurisdictions and under a range of collective bargaining statutes. It is not disqualified as a trade union in Ontario by the fact that its members in those other jurisdictions

and under those other statutes are not persons covered by the Ontario *Labour Relations Act*. It can be expected that the legislature in each such other jurisdiction will have recognized that collective bargaining requires an arms-length [sic] relationship between “employees” on the one hand and their “employer” on the other, and that in the interest of both sides it is necessary to put “managerial” employees on the employer’s side of the table in shaping any particular collective bargaining relationship. It may be supposed, therefore, that each jurisdiction and each collective bargaining statute will draw that managerial line or assign the task of line drawing to a tribunal empowered to administer the statute. While the principle of separation of employer and employee interests may be clear, the result of its application may vary from jurisdiction to jurisdiction, from statute to statute and from tribunal to tribunal. A legislature may feel that the various interests involved in collective bargaining generally, or in certain employment sectors in particular, are better served by drawing the “managerial” line at a point different from that at which this Board might have drawn the line in the same circumstances. It would seem peculiar and, frankly, pretentious if we were to deny an international, national or provincial trade union the opportunity to represent Ontario employees merely because some legislative body or administrative tribunal has required it to represent persons whom we would not, by reason of their duties, have included in a bargaining unit established under the *Labour Relations Act*. It is one thing to be ever vigilant against the mischief of company dominated unions. It is quite another to insist that those organizations which appear before this Board as trade unions conduct themselves in accordance with our views of membership purity regardless of the consequences to their ability to function in other jurisdictions. When public sector unions (OPSEU, for example) come before this Board for certification under the *Labour Relations Act*, we do not require of them proof that in their representation of employees under other statutes they have not undertaken the representation of, or accepted as members, persons whose job functions might appear to us to be “managerial”.

59. We conclude that the phrase “organization of employees” in paragraph 1(1)(p) of the Act does not mean “organization of employees only”. The mere fact that an organization has in its membership persons whose employment requires them to exercise managerial functions within the meaning of paragraph 1(3)(b) of the Act will not stand in the way of a finding that the organization is a “trade union” within the meaning of paragraph 1(1)(p) of the Act, if it otherwise qualifies to be so described. We respectfully decline to follow those earlier decisions which held otherwise. We acknowledge and share the concern those earlier decisions expressed about the “potential for conflict of interest” which can appear when managerial employees are members of trade unions. The need to keep employers and bargaining agents at arm’s length is fundamental to the scheme of the *Labour Relations Act*, but the right of employees on a majoritarian basis to freely choose their bargaining agent is equally fundamental. As a result, it is not for the Board to withhold rights from a freely selected trade union on grounds other than those contemplated by the Act. Sections 13 and 48 speak to actual employer participation and support. A speculative concern about an organization’s vulnerability to employer domination no more justifies denial of representation rights than would a concern that the composition of a trade union’s general membership, or of another bargaining unit it represents, might divert it from the single-minded pursuit of the interests of the employees in the particular bargaining unit it seeks to represent (see *H. Gray Limited*, 55 CLLC 18,011, and *Canadian Iron Foundries*, 56 CLLC 18,027). The *Labour Relations Act* provides safeguards against the realization of any potential for conflict of interest. By virtue of section 68 of the Act, a trade union which acquires the right to represent the employees in a bargaining unit assumes a duty to act fairly toward those employees in exercising that right, and that will require that the trade union avoid conflicts with the interests of persons excluded from that unit. While managerial membership alone will not trigger sections 13 and 48, the potential application of those sections to the trade union and, consequently, of section 64 to some one or more employers, will throw a spotlight on the reasons for such membership, and on the nature and degree of such members’ participation in the affairs of the trade union. In the ordinary case, one would wonder why a person would join an organization devoted to collective bargaining in which it cannot represent him. When he is actively involved in those collective bargaining activities, one’s wonder would grow at tolerance by his employer and by the trade union of any apparent conflict of interest, especially when the managerial employee had no protected right to join the trade union or participate in its activities. While it will be a question of fact in each case whether managerial members are acting on behalf of employers, there will



be some cases where the absence of any explanation for the managerial employees' membership and active participation in a trade union may support an inference of employer domination. There will be few cases where, as here, the employees' allegedly managerial duties and concurrent trade union membership can be explained by the fact that *both* are compelled by law. Thus, sections 13, 48 and 68 encourage trade unions to confine the influence of managerial members; section 64 provides a similar incentive to employers. These provisions, together with the bargaining unit's ultimate remedy of changing or terminating its bargaining agent, are the safeguards the legislature has decided to provide for "conflicts of interest" in a system of free collective bargaining in which the concern for viable and independent bargaining representatives must share attention with the concern for the freedom to choose bargaining representatives on a majoritarian basis.

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61. As we noted earlier, the Board found OSSTF to be a trade union in *Board of Education for the Borough of Scarborough*, *supra*, where that question had been put squarely in issue. By virtue of section 105 of the *Labour Relations Act*, that earlier finding constitutes *prima facie* evidence of that fact in these proceedings, and that *prima facie* evidence has not been rebutted. Accordingly, we find that the applicant is a trade union.

58. The very same question arose in *York No. 2*, where quite a number of occasional teachers had expressed an interest in collective bargaining but apparently had different views about the organization best able to represent them. Some occasionals opted for membership in the Ontario Public Service Employees Union which currently represents occasional teachers employed by the Toronto Board of Education and community college teachers under the *Colleges Collective Bargaining Act*. Others opted for membership in OSSTF which represents the contract teachers that the occasionals replace both in York and at other boards of education in Ontario. The respondent employer and OPSEU both took the position that OSSTF was not a trade union and that, therefore, it could not properly appear on the ballot for pre-hearing representation vote which the Board had directed. Their assertion was that since OSSTF was not a trade union, it was not a choice properly open to the occasionals seeking representation. The arguments are summarized at paragraphs 33-40 and are similar to those raised in the earlier *York* decision and by the respondent in this case:

33. The position of the respondent and the intervener can be quite simply stated. They argue that under section 1(1)(p), a trade union is an organization composed *exclusively* of employees or of *employees only*. A trade union cannot be an organization of employees *and others*; and, in particular, a union cannot include among its membership persons who are not employees under the Act, and could not be considered employees because of section 1(3)(b). Of course, strictly speaking, section 1(3)(b) cannot have any application because all contract teachers, including principals, vice-principals and department heads are excluded from the Act because of section 2(f). However, the respondent and intervener argue that principals and vice-principals and department heads, individually or collectively, have effective managerial authority over the occasional teachers, of a kind and character which would fall within the ambit of section 1(3)(b) if it applied to them. It is argued that because they are also members of OSSTF, OSSTF cannot be considered to be a trade union. It follows that OSSTF is not entitled to represent occasional teachers and that occasional teachers are precluded from selecting OSSTF as their bargaining agent. We were referred to the following Board decisions: *Hydro Electric Power Commission of Ontario*, [1971] OLRB Rep. 501, *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 84, *Chrysler Canada Limited*, [1975] OLRB Rep. Nov. 852, *Armour Associates Ltd.*, [1976] OLRB Rep. March 117, *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651, and *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. Particular reliance is placed on the *HEPCO* case, *supra*, which held that an organization which included among its members persons who exercised managerial responsibilities, was not a "trade union" within the meaning of the Act, because a "trade union" must be composed *exclusively* of employees.

34. In reply, OSSTF points out that all of the decisions relied upon by the respondent and intervener are clearly distinguishable on the basis that none of the associations dealt with in those cases had, as OSSTF does, a far-reaching and independent base comprising thousands of members, and an established independent collective bargaining role under another statute. OSSTF cannot possibly be considered a weak, dependent, or “company-dominated” organization, controlled by “agents as management”, nor can the respondent plausibly make that claim. That is the “mischief” which concerned the Board in *HEPCO* and the other cases mentioned above, but it is not present here. Indeed, it is OSSTF’s forthright and effective advocacy on behalf of teachers’ interests which may make it attractive to the occasional teachers.

35. In OSSTF’s submission, the purported conflict of interest referred to by the respondent and the intervener is a “red herring” which, in practice, is unlikely to occur, and which has not interfered with orderly collective bargaining in the education sector where principals and vice-principals are, by statute, included in the bargaining unit with contract teachers. The Legislature considered whether the exercise of administrative or supervisory functions prevented principals and vice-principals from being included in a bargaining unit along with their professional peers and decided that it did not. OSSTF urges the Board to consider this particular professional context and legislative choice, and not to “second-guess” the decision of the Legislature. OSSTF also notes that no occasional teacher has raised any concern about the composition of its membership. Only the respondent and intervener have done so. OSSTF asks rhetorically: why should occasional teachers be deprived of the right to choose OSSTF because of the respondent’s allegations of conflict of interest? Even from the respondent’s perspective, there is no reason to believe that principals, vice-principals and department heads will not be able to continue to fulfill their responsibilities to the respondent just as principals and vice-principals currently do with respect to contract teachers. The alleged managerial role does not impede collective bargaining under Bill 100, and, if anything, it is more marked in respect of contract teachers than occasionals. OSSTF asserts that the respondent and intervener are attempting to import as critical criteria in this jurisdiction, factors which both the Legislature and the Matthews Commission have rejected. If principals and vice-principals can be in the same bargaining unit as contract teachers under Bill 100, without creating a collective bargaining anomaly, then occasional teachers can be represented by OSSTF, if that is their wish. The statutory scheme under the *Labour Relations Act* is flexible enough to accommodate any difficulties without finding that OSSTF is not a “union”.

36. OSSTF further argues that the Board has no jurisdiction to read the word “exclusively” or “employees only” into the definition of a trade union found in section 1(1)(p) of the Act. The Board cannot add a qualification which does not appear on the words of the statute itself (see: *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498), and there is no need to do so here where the membership of OSSTF, including any arguable anomalies, has been prescribed by law. The so-called managerial personnel are members of OSSTF because the Legislature has prescribed that they must be. Moreover, the fact that OSSTF, or any other union for that matter, may have among its members persons not covered by the *Labour Relations Act* is inevitable, given the fragmented legislative jurisdiction over labour relations. OPSEU also includes thousands of employees who are not covered by the *Labour Relations Act*, but that does not mean it is not a trade union when it seeks to organize employees who *are covered* by the *Labour Relations Act*. Because the *Canada Labour Code* applies to “supervisors”, any union operating in the federal jurisdiction will quite likely have among its members persons whom the Board would consider “managerial”. Again, that does not mean that a union operating in the federal jurisdiction cannot be a trade union under the *Labour Relations Act*. A union might not be able to represent such persons under the *Labour Relations Act*, however, that does not mean that they could not be taken into membership. A union does not cease to be a union if it offers membership to persons to whom the *Labour Relations Act* has no application - such as a lawyer, architect, agricultural employee, crown employee or teacher. There is a distinction between the right to join or be a member of a trade union, and the right to have that union represent you for collective bargaining purposes. A teacher could join OPSEU without affecting its union status even though OPSEU could not represent that teacher in collective bargaining.

37. In OSSTF's submission, it is an organization of employees in fact. Teachers are employees. So are principals, vice-principals and department heads. OSSTF does not cease to be a union because its membership may include some persons who might not be considered employees under the *Labour Relations Act* if that statute were applied to them. It is artificial to apply a section 1(3)(b) standard to persons to whom it does not apply at all, yet ignore the statute and experience which does govern the collective bargaining relationship of most teachers in Ontario and suggests that there is no collective bargaining anomaly if teachers higher in the administrative hierarchy are included in the same bargaining unit as those further down. Insofar as the *Labour Relations Act* does apply to members of OSSTF, there are no such members who exercise managerial functions.

38. Counsel for OSSTF notes that section 3 of the *Labour Relations Act* contemplates that any "person" is entitled to join a trade union and participate in its lawful activities. This, in itself, suggests that membership can be extended to non-employees. If it were otherwise, and if the Board were to apply a strict and literal meaning, the word employees in section 1(1)(p), a union would cease to be a union if any non-employee (retirees, spouses of members, the unemployed, etc.) were admitted to membership. Unions are not restricted by law to collective bargaining activities, however, if the respondent and intervener are right, any enrolment of non-employee members to pursue other endeavours (a co-operative housing project for example) could prejudice the union's status under the *Labour Relations Act*. But if unions, by law, are not restricted to collective bargaining endeavours, why should collective bargaining considerations be the sole determinant of who can be a union member?

39. OSSTF points out that many craft unions, particularly in the construction industry, count among their members person who have left bargaining units to become foremen, superintendents, and even the proprietors of small businesses. They retain their trade union membership for a number of reasons, the most pragmatic of which is the recognition that the vagaries of the market might well compel a change in their fortunes and a return to employment for which trade union membership is an advantage or prerequisite. They may also want to maintain their entitlement to union pension or welfare funds to which they may have contributed. Whatever the reason, these trade unions do have such persons among their members, and no one would seriously suggest that because of that they fail to meet the statutory definition of "trade union". The Board held otherwise in an unreported case involving the Hamilton Construction Association and Builders Exchange, and that view was sustained by the Court in *Hamilton Construction Association and Builders Exchange v. OLRB* [1963] 2 O.R. 393. There, it was found that Local 18 of the United Brotherhood of Carpenters and Joiners of America included among its membership certain superintendents and non-working foremen who exercised managerial functions in the sense intended by section 1(3)(b) of the Act, but neither the Board nor the Court was persuaded that Local 18 was not a trade union within the meaning of the Act.

40. Finally, OSSTF asserts that in light of the *Charter of Rights* guarantee of freedom of association, the Board should be loath to restrict the group with whom the occasional teachers (should they so wish) can associate for collective bargaining purposes. OSSTF argues that no such restriction is warranted unless there are compelling reasons of industrial relations policy. No such reasons are apparent here. If anything, the existing framework for teacher collective bargaining suggests that in this context, the potential for conflict between one teaching professional and another has not been regarded by the Legislature as having overriding collective bargaining significance. OSSTF asserts that section 3 should be given a liberal interpretation and any questions concerning the quality of representation or the union's independence are addressed elsewhere in the Act.

After considering and largely adopting the views of the panel in *York No. 1*, the Board went on to say:

42. We do not think any useful purpose would be served by reviewing the details of the Board's reasoning in the *Humewood House* decision. That reasoning comprises some thirty-five singled spaced pages, including a thorough review of all of the cases upon which the



respondent there relied. The respondent and OPSEU rely on the same decisions in this case. We are not convinced that in this case we should depart from the views and approach found in paragraphs 38 to 61 of the *Humewood House* decision. However, in view of the nature of the issues raised, we think it appropriate to add a few additional comments of our own.

43. We may begin by reiterating the highly unusual context in which all of these questions arise, and the difficulty which this Board faces in applying the *Labour Relations Act* not only in a professional context but to a fragment of the education sector over which we generally have no jurisdiction, and for which the Legislature has created distinctive collective bargaining structures and rules. We do not think this background can be ignored, nor, apart from the *Humewood House* decision, is the established Board jurisprudence of much assistance. The circumstances are unique, and this, in itself, distinguishes the present case from all of the decisions upon which the respondent employer relies.

44. OSSTF is no weak and dependent organization, sponsored by the employer and subject to its influence. Its integrity and independence cannot really be questioned, nor can one give much weight to the respondent's suggestion that its own position could be compromised in its dealing with occasional teachers, if OSSTF were found to be a trade union and certified to represent them. Not only is there no evidence whatsoever that principals, vice-principals and department heads would deal with occasional teachers any differently than they are doing now, but such residual concern on the respondent's part, must be weighed against its own submission that principals and vice-principals exercise significant managerial functions under Bill 100 in respect of contract teachers, and are under a statutory obligation to do so. Yet there was no evidence of the kind of conflict of interest which section 1(3)(b) was designed to avoid. Even assuming that principals and vice-principals have certain administrative and "managerial" responsibilities, it is significant that the Legislature has decided that they all should be included in the same bargaining unit as other teachers. We do not minimize the importance of preserving the independence of the employees' bargaining agent, but in this unusual context, and from a purely policy point of view, we see no reason to lean towards an interpretation of the *Labour Relations Act* which would prevent occasional teachers from choosing OSSTF to represent them. If anything, the circumstances suggest that the Board should lean in the other direction.

45. We do not find the language of section 1(1)(p) as clear and compelling as the respondent and intervener suggest. Despite the gloss given to the statutory language in the *HEPCO* decision, the fact is that the Act *does not* expressly require that a trade union be composed *exclusively* of employees or of *employees only*; and since a trade union is not confined to purely collective bargaining functions, one can easily envisage a variety of activities in which non-employee members might wish to engage: co-operative housing programmes, political activity, mutual insurance schemes, etc. Conversely, section 3 of the Act suggests that union membership should be open to "*persons*" - not "*employees*" - wishing to participate in these lawful activities. Even within the realm of the union's core functions - collective bargaining - it is obvious that from time to time it will number among its members persons who are unemployed, and section 106(2) of the Act recognizes that a union may include among its members persons exercising managerial functions, because the definition of that term can often be subject to debate. Obviously such inclusion should not, in itself, prejudice the organization's status as a trade union.

46. While the respondent employer suggests that there may be serious consequences for employees and their unions if management persons are admitted into membership, there is no evidence that that has been the experience in the education sector, nor in the context of construction trade unions which often permit managers and even small employers to continue to "carry their cards" against the day that they might have to "return to the tools". It would certainly be a surprise to the labour relations community if the Board were to hold that, because of this practice, all of these organizations are no longer trade unions. Yet that is what would flow from the interpretation the respondent and intervener urge upon us. It would also be a surprise to the union, such as the Communications Workers of Canada, which operates in the federal jurisdiction where supervisors are included in its bargaining unit and are eligible for membership. Nor can it be said that because a trade union's membership base is not covered

by the Act, it cannot be a union within the meaning of the Act. If that were the case, OPSEU, the exclusive bargaining agent for Crown employees, could not represent employees in the private sector. The word employee in section 1(1)(p) cannot be restricted to employees covered and defined by the *Labour Relations Act* or unions like OPSEU or the Quebec-based CNTU, whose origins and membership are in other jurisdictions, could not seek to represent employees under the *Labour Relations Act*. We do not think OSSTF loses its right to claim status as a union, because, by law, it must include people who are not covered by the Act, and who may exercise managerial functions vis-a-vis employee-members who are covered by the Act. Any anomalies can be effectively contained by sections 13, 48, 64 and 68, rather than the interpretation of section 1(1)(p) urged upon us by the respondent and intervener.

47. Does this shift of focus from section 1(1)(p) to sections 13, 48, 64 and 68 represent any retreat from the Board's often-stated concern about company-dominated unions or the independence of the bargaining parties? We do not think so. In our view, those sections provide ample protection should members of OSSTF, *acting on behalf of the employer*, seek to influence the employees' choice as to whether they should join a trade union or which trade union to join. Of course, it will be a question to be determined in each case whether a member of OSSTF was not acting on its behalf but on behalf of the employer, because it cannot be assumed that even someone in a so-called managerial position will necessarily be acting in the employer's interest when he encourages other employees to join a union. A case in point is *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. Feb. 130, application for judicial review dismissed, July 11, 1978 (unreported). There, the "lame duck" reeve actively solicited support for the union and both the Board and the Divisional Court concluded that the reeve was not acting on behalf of the employer, but actually against its interests. Of course, as the Board noted in the *Humewood House* decision, *supra*, the involvement of such persons in an organizing campaign would certainly raise a question which OSSTF or any other union would have to address, and the Board might well question the voluntariness of any membership evidence solicited by such individuals (see *Veres Wire Limited*, [1976] OLRB Rep. July 337) and might either discount such evidence or exercise its discretion to seek the confirmatory evidence of a representation vote. Under section 68 of the Act, any purported representation of occasional teachers by persons directly involved in their case or unable to faithfully play the role of independent advocate would trigger liability, just as it did in *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643. In that case it was held that the Ontario Nurses' Association breached its duty of fair representation when a union official who had rendered a professional judgment on the competence of a fellow nurse, purported to represent the union in a consequent disciplinary meeting with management. Section 68 presents a potent check on any inclination OSSTF may have to ignore the concerns of occasional teachers or sacrifice their interests to those of other OSSTF members - a possibility mentioned by the Matthews Commission in its report. We are not at this stage prepared to make the assumption that OSSTF or its members would do so.

48. For the foregoing reasons, we are satisfied that OSSTF is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. It is an organization of employees formed for purposes that include collective bargaining. There is no evidence before us to trigger section 13. We are satisfied, therefore, that the certification application can proceed. It remains to determine how one should apply the Act to the rather unique employment situation of occasional teachers.

59. In summary then, there is nothing in the evidence of this case to distinguish it from *York No. 2*. If anything, the respondent's principals exercise even less control over the occasionals' working conditions and work opportunities than was the case in *York No. 2*. Whether we apply this Board's own criteria developed under section 1(3)(b) of the Act, or such enlightenment as can be gleaned from the structure of Bill 100, we would not (and do not) conclude that in the context of collective bargaining, principals are "managerial". Nor are we persuaded that these earlier panels of the Board were wrong in their analysis of the statutory framework in which the rights of the parties in this case must be determined. The fact that a trade union may admit non-employees, employees not covered by the *Labour*

*Relations Act*, or even managerial personnel into membership, does not mean it ceases to be a trade union. And returning to the special circumstances of this case, we are constrained to observe that we do not think the Legislature intended explicitly or implicitly to limit the range of organizations which the occasionals may wish to represent them. Certainly, from a policy point of view, we see little merit in an interpretation of our statute which would limit the occasionals' choice of bargaining agent and effectively preclude them from being represented by the very organizations which one would ordinarily expect to be most familiar with their professional concerns and collective bargaining needs. While the Board must obviously give effect to the words of the statute, we think it is legitimate to ask whether the Legislature intended to prevent the respondent's elementary occasionals from being represented by an organization like OPS. Whatever the general impact of the analysis urged upon us by the respondent, that is the result urged upon us in this particular case.

61. Of course, to decide this case we do not have to embrace all aspects of the analysis in *York No. 1* or *York No. 2*. In particular, we do not have to deal (and neither did they) with a situation in which the applicant is an organization composed of employees under the *Labour Relations Act* and persons who *would be* employees under the *Labour Relations Act* were it not for the fact that section 1(3)(b) deems that they are not because, in the opinion of this Board, they exercise managerial functions. This case is not really like *HEPCO* where the Board struggled with the notion of an organization purportedly composed of "pure employees" and persons who might well exercise managerial authority over those very individuals (see, for example, *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651). Here, the critical group - the principals (and vice-principals) - are not covered by the *Labour Relations Act* at all. They can never be part of the same bargaining unit as occasionals. They have statutorily prescribed administrative and collective bargaining responsibilities, and when one considers the conflict of interest rationale which underlies the exclusion of management from collective bargaining, the functions they perform are (on the evidence and in context) not, in the opinion of the Board, of a managerial character because they do not make decisions which regularly and adversely impact on the employment conditions or security of other teachers. To the extent that such impact is arguable, or the principals might be said to exercise a "managerial" role precluding participation in collective bargaining, the Legislature has supplied the answer: principals and teachers are, by law, to be assigned to the same bargaining unit and are required to be members of the same statutory bargaining agent. Against this background, it is difficult to hold that OPS cannot be a trade union because it includes among its members persons whose managerial status is at best doubtful even if the *Labour Relations Act* applied to them, and who are not treated as "managerial" under the statute covering teacher collective bargaining.

Does it matter that most teachers are not covered by the Labour Relations Act?

61. Is there anything to the respondent's point that the vast majority of OPS' purported members (by our calculation almost ninety-nine per cent) although *employees* at common law and under the relevant "teacher" legislation, are not employees under the *Labour Relations Act* because section 2(f) says they are not covered? The respondent maintains that while the occasionals are undoubtedly "employees" under the *Labour Relations Act*, contract teachers are not - hence (it is said) there was no "organization of employees" or "trade union" which the occasionals could join. The fact that OPS has tried to, and purported to, take occasionals into membership is quite irrelevant. OPS was not a "trade union" prior to recruiting some occasionals, and did not become one when it did so.



62. We do not agree. We do not think that the word employee in section 1(1)(p) is limited to employees who fall within the ambit of the *Labour Relations Act*. If that were the case, an organization like the Ontario Public Service Employees Union (formerly the Civil Service Association of Ontario) composed initially of provincial crown employees could not have organized public sector workers covered by the *Labour Relations Act*. Similarly, an organization like the CNTU/CSN based in Quebec or CAIMAW based in British Columbia could not expand into Ontario because its membership base was not composed of employees covered by the Ontario Act. A union representing craft, technical, or clerical employees of Bell Canada, under federal jurisdiction, could not apply to represent the subsidiaries or dependencies of Bell whose activities fall within provincial jurisdiction. An organization of employees originating in the United States (as the Steelworkers and Autoworkers did) or in some other province, could not expand into the Ontario jurisdiction. Employees who wanted to join any of these organizations would be prohibited from doing so because they had not been present in Ontario before, and subject to the *Ontario Labour Relations Act*. Yet section 1(1)(p) expressly contemplates that there can be both national and international unions, which means that an organization can still be a union even though the majority (perhaps even the vast majority) of its members will not be covered by the *Labour Relations Act*. And if a union like the United Food and Commercial Workers took agricultural employees into membership and sought to represent them (albeit under the common law collective bargaining rules which governed teacher collective bargaining prior to Bill 100), the UFCW would prejudice its status as a “union” under the *Labour Relations Act*.

63. We do not accept this interpretation of section 1(1)(p) of the Act, not only because of these anomalous consequences, but also because, in our view, it would require us to “read in” words which are not there. The respondent would have us interpret section 1(1)(p) as if it read: “‘trade union’ means an organization composed *exclusively* of employees defined or covered by the *Labour Relations Act*. But that is not what section 1(1)(p) says. In our view, it should be given an expansive reading so as to embrace any employee collective bargaining agency, wherever situated and regardless of the statutes regulating it, so long as the organization represents at least some employees to whom the *Labour Relations Act* applies, and otherwise meets the definition of ‘trade union’. We do not think that the Legislature ever intended that an employee’s freedom of association should be circumscribed along such narrow jurisdictional lines or that employee organizations with collective bargaining rights under other legal regimes must be precluded from representing employees under the *Labour Relations Act*.

64. In conclusion, we find that OPS is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*. We turn, then, to the alternative grounds which the respondent asserts prevent OPS from seeking to represent its elementary school supply teachers.

The Constitutional-Discrimination Issue: Does OPS engage in sexual discrimination which would preclude its certification as the occasionals’ bargaining agent? Can occasionals and women be “members” of OPS under its constitution and for the purposes of the Act?

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65. For this branch of the respondent’s argument, it is necessary to review some history.

66. As Mr. Andrew pointed out, OPS was initially a voluntary association of *male* teachers which was incorporated by letters patent at Toronto on February 22, 1921 and was then known as the Ontario Public School *Men* Teachers' Federation. OPS has represented teachers in professional and other relationships with their employers long before the passage of Bill 100 or any other collective bargaining legislation for that matter. It is a body corporate, and, as such, it is entitled to pursue or change its objectives unless there is some self-imposed or external legal restraint.

67. By supplementary letters patent dated at Toronto on June 22, 1982, the Minister of Consumer and Commercial Relations permitted OPS to delete the term "men" from its name. This initiative was undertaken because of OPS' desire to eliminate "sexist" connotations which were thought to be entirely inappropriate in a modern professional organization. That effort to change its name was opposed by FWTAO and OSSTF and eventually made its way to the Divisional Court. (See: *Re Federation of Women Teachers' Association of Ontario et.al. and Minister of Consumer and Commercial Relations et.al.* (1984) 46 OR (2d) 645.) The Court rejected the challenge and affirmed the change in name, observing in part as follows at page 655:

The goal of the respondent is to change the existing structure by bringing all public elementary school teachers within one organization. The governing bodies of the appellant [FWTAO] and the OTF [Ontario Teachers Federation] have rejected the respondent's [OPS'] attempts to effect a merger of the appellant and respondent, but the respondent has encouraged female teachers to join it as voluntary members. It now has some 480 female members out of a total membership of almost 15,000. The dropping of the word "Men" made the respondent's name more accurately descriptive of its membership (now both men and women), and was also expected to help in the recruiting of more women members.

The appellant opposed any change in the *status quo*, in which the male and female teachers have separate organizations recognized in the statutes. The question is whether the Minister was wrong in refusing to deny a corporate name change that otherwise reflected the changing nature of the respondent corporation, because of the concern of a rival body that it might lose members. The respondent made no secret of its intention to seek voluntary members from the women teachers, and eventually to have one organization of both men and women for all purposes. It is difficult to see how the respondent could achieve this result if it were contrary to the wishes of the female teachers. The appellant [FWTAD] has almost 30,000 members, about twice as many as the respondent. If the bulk of the women public school teachers wish to continue to be represented separately from the men teachers, then the respondent will not achieve its goal. And if the women all joined the respondent, they would at once be able to take control of it. I do not think any valid reason was shown why the Minister should not have let the teachers themselves be free to indicate by their conduct in joining or not joining the respondent whether there should be one common association, without requiring the respondent to operate with a name that is no longer appropriate.

The status of women has changed drastically since 1921, when the appellant and the respondent were incorporated, and since 1944, when they were given their separate statutory responsibilities. The Ontario *Human Rights Code* 1981 (Ont.), c.53, now recites that it is public policy in Ontario that every person is free and equal in dignity and rights without regard to sex. It is not clear to me that the existence of separate organizations for men and women teachers is not now an anachronism, which might become more evident if the teachers were permitted to become voluntary members of one common organization, if they choose to do so. In the meantime, the appellant and the respondent can continue to fulfill their responsibilities to their statutory members under the statute.

I am unable to accept the argument of counsel for the appellant that public policy requires the statutory scheme to be changed by statutory amendments before a name change can be

permitted as part of a movement that may ultimately lead to those statutory changes. I do not think it would be a proper exercise of the administration of the laws respecting corporate names for the Minister to use his powers to obstruct the legitimate democratic aspirations of a corporation simply because they ultimately may result in statutory changes....

Furthermore, I think the Minister was entitled to regard as favourable to the respondent's application the fact that the Minister of Education did not oppose the change in name that was requested, and took no sides in the debate as to how teachers should be represented.

68. It is difficult to dispute the learned judges' assessment that institutions divided on the basis of sex may well be an anachronism in today's society. Nor can one quarrel with their general notion that one should not lightly interpret the law so as to thwart an organization's "democratic aspirations", or that perhaps the teachers themselves can best decide whom they want to represent them by either joining or not joining a particular organization. Here, of course, we are not dealing with contract teachers, but rather whether occasionals (both men and women) can become members of and be represented by OPS. But the Court's implicit concern about freedom of association is one which we share, and, is recognized in section 3 and the Preamble to the Act.

## II

69. Membership in OPS is divided into two categories: statutory membership and voluntary membership. Statutory membership encompasses all male teachers required to be members of OPS because of the *Teaching Profession Act*, R.S.O. 1980, c.495, section 1(i) and the requirements of the Ontario Teachers' Federation by-laws. Article 4 of the OPS constitution reads as follows:

### Article IV - Membership

#### Section 1 - Statutory

##### (a) Every male teacher who:

(1) practices his profession wholly in the public elementary schools of Ontario, or who, under Bylaw 1, Section 4 of the OTC Constitution and Bylaws, has been designated as a member of a public elementary school affiliate; and

(2) is a teacher as defined in *The Teaching Profession Act*, RSO, 1980, c.493 Section 1(i) is a Member. (1983)

(b) The privileges and responsibilities of a Member of the Federation shall be those as designated by *The Teaching Profession Act* and by its Regulations, by this Constitution and by the Bylaws made thereunder.

70. Article IV, section 6 deals expressly with occasional teachers who are a category of "voluntary member":

#### Section 6 - Occasional

(a) Occasional Teacher Membership in the Federation may be granted by the Executive upon completion of application for membership form, provided the applicant:



- (1) is qualified to teach in the publicly-supported schools of Ontario, and
  - (2) is engaged in an educational capacity as an Occasional Teacher as defined in *The Educational Act*, and
  - (3) subscribes the application fees of \$1.00 with the application, which fee shall be returned if the application is rejected.
- (b) The duties, privileges and responsibilities of an Occasional Teacher Member shall be the same as those of Statutory Members.
  - (c) An Occasional Teacher Member shall be a Member of the District or Districts in which the Occasional Teacher is engaged to teach. (1984)

71. The *Teaching Profession Act* was passed in 1944, and gave recognition to the Ontario Teachers' Federation (OTF). OTF has among its objects: the promotion and advancement of the cause of education, raising the status of the teaching profession, promoting and advancing the interests of teachers and to secure conditions that will make possible the best professional service, and increasing public interest in educational affairs. OTF provides an umbrella organization for the five affiliates which retain their individual autonomy and select members on a proportional basis to the OTF board of governors. The *Teaching Profession Act* requires all contract teachers to be members of OTF and a bylaw of OTF, in turn, requires teacher-members to belong to one or the other of the affiliates.

72. That bylaw is a rather curious instrument. It is not a regulation nor does it have obvious statutory force; yet it clearly impinges upon the teachers' freedom of association, requiring them to be members, in some instances, of professional associations organized on the basis of gender, religion, or language. Bill 100 completes the picture by making those organizations the teachers' statutory collective bargaining agent.

73. The *Teaching Profession Act*, the bylaws of OTF, and Bill 100 stipulate whom OPS *must* represent, but we do not think they prescribe whom OPS *may* represent; and, in particular, we do not think that OPS is prohibited from representing occasional teachers. It is interesting to note that the Regulations under the *Teaching Profession Act*, expressly contemplate "voluntary membership" in OTF by a person who:

- (a) is not a member thereof;
- (b) holds a teacher's certificate;
- (c) is engaged in an educational capacity;
- (d) is a member of an affiliated body; and
- (e) makes application to the Board of Governors for voluntary membership in the Federation.

An occasional can be a member of OTF provided he/she is a member of an affiliate such as OPS. The bylaws of OTF also refer to OPS under its new name - implicitly recognizing that it admits to membership women who are not statutory members. We doubt whether OTF has

the legal authority to prohibit OPS from taking in voluntary teacher members of whatever sex or status, however, whether it does or not, OTF has not done so.

74. A perusal of the terms of the OPS constitution and a consideration of Mr. Andrew's evidence both indicate that, in some respects, occasional teachers may be in a somewhat different position from teachers who must be a member of OPS because the statute requires it. OPS does have different classes of membership which may have different obligations (fees, for example) or different claims or rights of access to OPS' resources. But those differences do not affect trade union status - see *Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (C.A.). In that case the Board held that CSAO was not a trade union because its constitution provided "for different classes of membership, one class having inferior rights and privileges to the other or others". The Court of Appeal disagreed. "Intermembership discrimination" (to borrow the words of Jessup J.A.) does not impair an employee organization's status or identity as a trade union, although it may raise a bar to certification if the discrimination is of a kind contemplated by section 13 of the *Labour Relations Act*.

75. However, we do not think that there is anything to the respondent's claim that OPS, in structure or practice, engages in a prohibited form of sexual discrimination. The respondent cannot point to a single incident or practice in which female members of OPS have faced invidious discrimination because of their gender. Indeed, OPS has taken steps to eliminate sexual distinctions among its ranks and has actually encouraged women to join. That women - although a minority, and only "voluntary members" - may fully participate in the life of the organization is evidenced by the fact that OPS has a woman president. The fact that, under Bill 100, OPS can only represent men, reflects the statutory scheme imposed by the Legislature, not the wishes of OPS. The objective of OPS is to have one professional organization representing all elementary school teachers both male and female, and, as the Divisional Court noted, it may well be able to accomplish that objective if it can recruit a sufficient number of women and persuade the Legislature to effect statutory changes. Nor, in our view, is it significant that certain female *voluntary* members of OPS, may have a weaker claim to OPS financial support in the event of collective bargaining or professional difficulties. This is not gender-based discrimination, but rather a realistic recognition of the fact that these women are compelled, by law, to belong to other organizations to which they are entitled to look for assistance. OPS, quite sensibly, does not try to duplicate the services available elsewhere or from the teachers' statutory collective bargaining agent. There is no evidence that any woman in difficulty has ever been denied assistance by OPS.

76. We are also constrained to note the novelty of an employer pleading invidious discrimination against employees as a way of preventing the certification of an organization which appears to be those employees' overwhelming choice. This is especially interesting in circumstances where, as here, the respondent has apparently been prepared to negotiate with OPS in respect of the wages of the very occasional teachers whom the respondent now says cannot properly be members of, or represented by, OPS. Surely it is curious for the respondent, by its conduct, to say to its occasionals, in effect: "OPS cannot represent you. You cannot be members of OPS. But we will allow OPS a role in determining your wages."

77. We are not satisfied that OPS practices discrimination of such kind as would trigger a bar to its certification under section 13 of the *Labour Relations Act*, nor are we persuaded that the statutory or constitutional framework within which OPS now operates prohibits it from taking women or occasionals into membership.

### III

78. In the circumstances of this case, the decision in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, (1970) S.C.R. 425, relied upon by the respondent, can have no application. *Metropolitan Life* held that an employee could not be a “member” of a trade union for the purposes of the *Labour Relations Act* if he did not meet the membership requirements in the union’s constitution. That decision was reversed almost immediately by the Legislature which, in response, added sections 1(1)(l) and 103(4) to the *Labour Relations Act*. Those sections read as follows:

1.-(1) In this Act,

• • •

(1) “member”, when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and “membership” has a corresponding meaning.

103.-(4) Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for such eligibility requirements.

79. When those two sections are read together they provide a complete code of what “membership” is to mean for the purposes of the Act. An employee is a member if he meets the terms of section 1(1)(l) whether or not he can be a member under the terms of the union’s constitution. Even if he does not meet the provisions of section 1(1)(l) and does not meet the eligibility requirements of a union’s charter, constitution or bylaws, the Board may still find him to be a member for the purposes of the Act if the Board is satisfied that a trade union has an established practice of admitting such persons to membership without regard to the eligibility requirements of its constitution. Here, the occasionals not only meet the test of 1(1)(l), not only are entitled to membership by the express terms of the OPS constitution, but also, as a matter of recent practice, have been admitted to membership whatever the constitution may provide. *Metropolitan Life* has no application.

### Conclusion

80. This disposes of the respondent’s challenges to the status of OPS and its right to represent elementary occasionals. Under ordinary circumstances we would turn to the description and composition of the bargaining unit, and whether (as appears to be the case) OPS has the support of the majority of the employees in the unit. However, it was recognized at the hearing that while the respondent’s supply list of 80 or so teachers should all be on the list as employees in the bargaining unit there might have to be certain additional filings



if the Board were disposed to apply here the approach to the composition of the bargaining unit outlined in *York No. 2*. (But there, of course, the list and selection system were neither so limited, formalized or mechanical as the one now before us.) In any event, since the focus has heretofore been on OPS rather than the unit, we consider it appropriate to extend the parties the opportunity to make any additional submissions respecting any remaining issues to be determined. Such submissions should be forwarded to the Board and each other within 21 days of the release hereof.

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# APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1986

## BARGAINING AGENTS CERTIFIED

### No Vote Conducted

**3351-84-R:** Ontario Public Service Employees Union, (Applicant) v. Cradleship Creche of Metropolitan Toronto, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent providing private-home day-care in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and employees in any bargaining unit for which a trade union held bargaining rights as of March 14, 1985." (111 employees in unit). (*Clarity Note*).

**3426-84-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Coca-Cola Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: (See *Applications for Certification Dismissed - No Vote Conducted.*)

Unit #2: "all employees of the respondent at 81 Turnberry Avenue, Toronto, Ontario, save and except persons employed in the office area, persons employed in the quality assurance department, confidential secretary to the general manager, confidential secretary to the sales manager, confidential secretary to the office manager, assistant office manager, office manager, foreman and sales supervisors, persons above the rank of foreman, sales or office manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and persons covered by an existing collective agreement as of May 3, 1985." (35 employees in unit). (*Having regard to the agreement of the parties*).

**1449-85-R:** Brewery, Malt and Soft Drink Workers, Local 304, (Applicant) v. Orangeroot of Canada (operating as Howard Johnson Motor Lodge and Restaurant, St. Catharines, (Respondent).

Unit: "all employees of the respondent in St. Catharines save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (68 employees in unit).

**1465-85-R:** United Steelworkers of America, (Applicant) v. Plaza Fibreglas Manufacturing Limited, and Plaza Electro-Plating Limited, (Respondents).

Unit: "all employees of Plaza Fibreglas Manufacturing Limited and Plaza Electro-Plating Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (352 employees in unit). (*Having regard to the agreement of the parties*).

**1622-85-R:** Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Bell Air Conditioning Inc., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". (9 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

**1843-85-R:** Lumber and Sawmill Workers' Union Local 2693, of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. J. & P. Cleaners, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit). (*Having regard to the agreement of the parties*).

**1912-85-R:** United Steelworkers of America Inc., (Applicant) v. D.D.I. Seamless Cylinder International Inc., (Respondent).

Unit: "all employees of the respondent in the City of Sault Ste. Marie, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (15 employees in unit). (*Having regard to the agreement of the parties*).

**1931-85-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Selton Engineering Construction Inc., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

Unit: "all carpenters and carpenters' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit). (*Having regard to the agreement of the parties*).

**1941-85-R:** Brewery, Malt and Soft Drink Workers, Local 304, (Applicant) v. Woodings - Railcar Limited, (Respondent).

Unit: "all employees of the respondent at Alexandria, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and students employed pursuant to an educational work experience program." (27 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2079-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Elirpa Construction and Materials Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit).



Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in unit).

**2179-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Morton Ravzen & Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent working at and out of St. Catharines, Ontario, save and except office and clerical staff, salesmen, dispatcher, foreman and those above the rank of foreman, and employees in bargaining units for which any trade union held bargaining rights as of November 27, 1985.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2319-85-R:** Canadian Union of Public Employees, (Applicant) v. Paul Metzger, (Respondent).

Unit: “all employees of the respondent at Norwell District Secondary School in Palmerston save and except manager and persons above the rank of manager.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2362-85-R:** Ontario Nurses’ Association, (Applicant) v. Blue Water Rest Home, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity, save and except Director of Nursing and persons above the rank of Director of Nursing.” (8 employees in unit). (*Having regard to the agreement of the parties*).

**2417-85-R:** Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Tilon Management Ltd., (Respondent).

Unit: “all employees of the respondent employed at Lincoln Place Nursing Home in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff. (31 employees in unit). (*Having regard to the agreement of the parties*).

**2459-85-R:** United Steelworkers of America, (Applicant) v. Protectaire Systems Canada, Inc., (Respondent).

Unit: “all employees of the respondent in Niagara Falls, save and except foremen and persons above the rank of foreman, office, technical, clerical and sales staff.” (16 employees in unit). (*Having regard to the agreement of the parties*).

**2467-85-R:** Labourers’ International Union of North America, Local 493, (Applicant) v. Ferlanti Management Inc., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

**2468-85-R:** Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union Local 88, (Applicant) v. 605452 Ontario Ltd. c.o.b. as O’Tooles Roadhouse Restaurant, (Respondent).

Unit: "all employees of the respondent at 4505 Sheppard Avenue East, in the Municipality of Metropolitan Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office staff." (29 employees in unit). (*Having regard to the agreement of the parties*).

**2479-85-R:** Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. 646635 Ontario Inc. o/a Versahaul Leasing, (Respondent).

Unit: "all employees of the respondent in Hamilton, save and except foremen, persons above the rank of foreman, office, clerical and sales staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

**2480-85-R:** United Steelworkers of America, (Applicant) v. Unilux Manufacturing Company Inc., (Respondent).

Unit: "all employees of the respondent in the Town of Vaughan, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (67 employees in unit). (*Having regard to the agreement of the parties*).

**2484-85-R:** Canadian Union of Public Employees, (Applicant) v. Participation House - Niagara Region Apartment Project, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Niagara, save and except manager, persons above the rank of manager and office staff." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2487-85-R:** The Canadian Union of Public Employees, (Applicant) v. Creedan Valley Nursing Home Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Creemore save and except department heads, persons above the rank of department head, director of nurses and office and clerical staff." (63 employees in unit). (*Having regard to the agreement of the parties*).

**2493-85-R:** Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Weiland Ford Sales Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except assistant manager, persons above the rank of assistant manager, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (26 employees in unit). (*Having regard to the agreement of the parties*).

**2495-85-R:** International Union, United Plant Guard Workers of America, Local 1962, (Applicant) v. General Motors of Canada Limited, (Respondent).

Unit: "all security guards employed by the respondent in the Municipality of Metropolitan Toronto save and except sergeants, those above the rank of sergeant, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2538-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Barbieri Bros. Inc., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and

except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in unit).

**2549-85-R:** Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Diamond Baling Company Ltd./R. E. Dumouchelle & Sons Limited, (Respondent) v. Employee, (Objector).

Unit #1: “all employees of R. E. Dumouchelle & Sons Limited in the County of Essex, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff and employees in bargaining units for which any trade union held bargaining rights as of January 17, 1986.” (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of Diamond Baling Company Ltd. in the County of Essex, Ontario, save and except supervisors, persons above the rank of supervisor, clerical, office and sales staff and employees in bargaining units for which any trade union held bargaining rights as of January 17, 1986.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**2576-85-R:** Labourers’ International Union of North America, Local 183, (Applicant) v. Samburu Holdings Limited and/or Greenwin Property Management and/or Greenwin Condominium Management, (Respondent).

Unit: “all employees of the Respondent engaged in cleaning and janitorial services at Annabelle Tower, 2677 Kipling Avenue in the Municipality of Metropolitan Toronto, including resident superintendents, save and except property manager and persons above the rank of property manager.” (2 employees in unit). (*Having regard to the agreement of the parties*).

**2578-85-R:** Independent Canadian Steelworkers Union, (Applicant) v. VS Services Ltd., (Respondent).

Unit #1: “all employees of the respondent at Niagara College, Welland, Ontario save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (18 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**2581-85-R:** Local 164, Draftsmen’s Association of Ontario International Federation of Professional and Technical Engineers, A.F.L., C.I.O., C.L.C., (Applicant) v. Westinghouse Canada Inc. Electronics, Control and Distribution Products Division, (Respondent).

Unit: “all draftsmen, apprentice draftsmen and tracer-illustrators employed by the respondent at 3365 Harvester Road, Burlington, save and except supervisors and persons above the rank of supervisor, and students employed during the school vacation period.” (14 employees in unit). (*Having regard to the agreement of the parties*).

**2587-85-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees, Local 351, (Applicant) v. Signtech Inc., (Respondent) v. Group of Employees, (Objectors).



Unit: "all employees of the respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (92 employees in unit). (*Having regard to the agreement of the parties*).

**2591-85-R:** United Food & Commercial Workers Union C.L.C., A.F.L.-C.I.O., (Applicant) v. Designer Classics Carpet Manufacturing Limited, (Respondent).

Unit #1: "all employees of the respondent in the City of Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (87 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (See: *Applications for Certification Dismissed - No Vote Conducted*).

**2592-85-R:** Canadian Union of Public Employees, (Applicant) v. B.R.D. Maintenance Services Ltd. (Respondent).

Unit: "all employees of the Respondent in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period and persons for which any trade union held bargaining rights as of January 23, 1986 being the date of application." (33 employees in unit). (*Having regard to the agreement of the parties*).

**2614-85-R:** Ontario Public Service Employees Union, (Applicant) v. Cornwall General Hospital, (Respondent).

Unit: "all x-ray technologists, medical laboratory technologists, medical laboratory technicians and their assistants in the employ of the respondent at Cornwall, Ontario regularly employed or not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant chief technologist, persons above the rank of assistant chief technologist, and persons for which any trade union held bargaining rights as of January 28, 1986." (8 employees in unit). (*Having regard to the agreement of the parties*).

**2616-85-R:** Teamsters Chemical Energy and Allied Workers Union Local 424, (Applicant) v. Resco Chemicals & Colours Ltd., (Respondent).

Unit: "all employees of the Respondent in Mississauga, save and except supervisors, persons above the rank of supervisor, office, sales, clerical and laboratory staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (38 employees in unit). (*Having regard to the agreement of the parties*).

**2632-85-R:** Local 269, Sheet Metal Workers' International Association, (Applicant) v. Mar Sheet Metal Ltd., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cra-mahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

**2633-85-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. United Co-operatives of Ontario, (Respondent).

Unit: “all employees of the Respondent in the Township of Sandwich South, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

**2636-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. U D M Excavating & Contracting Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in unit).

**2649-85-R:** Graphic Communications International Union, Local 500M, (Applicant) v. Chambers ABC of Canada Ltd., (Respondent).

Unit: “all employees of the Respondent in Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (22 employees in unit). (*Having regard to the agreement of the parties*).

**2652-85-R:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Alpine Graphic Productions Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (16 employees in unit). (*Having regard to the agreement of the parties*).

**2654-85-R:** Ontario Public Service Employees Union, (Applicant) v. Ross Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all paramedical employees of the respondent in Lindsay, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and employees in bargaining units for which any trade union held bargaining rights as of January 30th, 1986, being the date of application.” (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all paramedical employees of the respondent in Lindsay regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of January 30th, 1985, being the date of application.” (41 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

**2667-85-R:** Canadian Union of Public Employees, (Applicant) v. Children's Castle Day Care Limited, (Respondent).

Unit: "all employees of the respondent in Ottawa, save and except head teacher, persons above the rank of head teacher, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

**2689-85-R:** International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Latem Industries Limited, (Respondent).

Unit: "all employees of the respondent in Waterloo, save and except foremen, persons above the rank of foreman, and office staff." (26 employees in unit). (*Having regard to the agreement of the parties*).

**2690-85-R:** Ontario Public Service Employees Union, (Applicant) v. Lindsay and District Association for the Mentally Retarded, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at Lindsay, Ontario, save and except program directors, persons above the rank of program director, senior vocational supervisor, office and clerical staff, foster parents, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Lindsay, Ontario, employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except program directors, persons above the rank of program director, senior vocational supervisor, office and clerical staff, and foster parents." (30 employees in unit). (*Having regard to the agreement of the parties*).

**2775-85-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Victory Plumbing Inc., (Respondent).

Unit: "all plumbers, plumbers' apprentices, steamfitters, and steamfitters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit). (*Clarity Note*).

**2779-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Norsan Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).



**Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**

**2117-85-R:** Service Employees International Union Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Christie Street Senior Residences Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, Ontario, save and except registered, graduate, and undergraduate nurses, paramedical staff, activity director, office and clerical staff, supervisors, and persons above the rank of supervisor.” (49 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list	52
Number of persons who cast ballots	46
Number of segregated ballots cast by persons whose names do not appear on voters’ list	2
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	18

**2416-85-R:** International Union of Operating Engineers, Local 796, (Applicant) v. The Riverdale Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: “all stationary engineers and helpers engaged in the operation and maintenance of boilers, air compressors, refrigeration and air conditioning equipment and all related equipment, save and except the Assistant Chief Engineer and those above the rank of Chief Engineer.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	0

**2476-85-R:** Ontario Public Service Employees Union, (Applicant) v. The Riverdale Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers Local 101, (Intervener #1) v. Canadian Union of Public Employees, (Intervener #2).

Unit: “all paramedical employees of the Respondent in Metropolitan Toronto, save and except Supervisors and persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students on field placement from a school, College or University, and employees for which any trade union held bargaining rights as of January 9, 1986.” (25 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	18
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	4

**Bargaining Agents Certified Subsequent to a Post-Hearing Vote**

**2380-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Alpha Taxi Ltd., (Respondent) v. Canadian Union of Operating Engineers and General Workers Local 222, (Intervener).

Unit: "all employees of the respondent licensed as drivers by the City of Ottawa, save and except single plate owners or single plate lessees, garage staff, office staff, dispatchers, supervisors and persons above the rank of supervisor and persons for which any trade union held bargaining rights as of January 18, 1984." (23 employees in unit).

Number of names of persons on list as originally prepared by employer	23
Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	6

**2993-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Diamond Taxi (Ottawa) Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 222, (Intervener).

Unit: "all employees of the respondent licensed as drivers by the City of Ottawa, save and except single plate owners or single plate lessees, garage staff, office staff, dispatchers, supervisors and persons above the rank of supervisor and persons for which any trade union held bargaining rights as of March 20, 1984." (93 employees in unit).

Number of names of persons on list as originally prepared by employer	93
Number of names of persons on revised voters' list	54
Number of persons who cast ballots	54
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	23

**2994-83-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 22, (Intervener) v. Richard M. Gorman, (Employee).

Unit: "all employees of the respondent licensed as drivers by the City of Ottawa, save and except single plate owners or single plate lessees, garage staff, office staff, dispatchers, supervisors and persons above the rank of supervisor and persons for which any trade union held bargaining rights as of March 20, 1984." (75 employees in unit).

Number of names of persons on list as originally prepared by employer	283
Number of names of persons on revised voters' list	137
Number of persons who cast ballots	137
Number of ballots marked in favour of applicant	125
Number of ballots marked against applicant	13

**1700-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Alpha Taxi Ltd., (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 222, (Intervener).

Unit: "all single plate owner/operators and single plate lessees employed by the respondent in Ottawa, save and except supervisors, and persons above the rank of supervisor, garage staff, office staff and dispatchers." (41 employees in unit).

Number of names of persons on list as originally prepared by employer	41
Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked in favour of intervener	6

**1702-84-R:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 222, (Intervener) v. Richard M. Gorman, (Employee).

Unit: "all single plate owner/operators and single plate lessees employed by the respondent in Ottawa, save and except supervisors, and persons above the rank of supervisor, garage staff, office staff, and dispatchers." (264 employees in unit).

Number of names of persons on list as originally prepared by employer	299
Number of names of persons on revised voters' list	158
Number of persons who cast ballots	158
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	136
Number of ballots marked in favour of intervener	19

**1982-85-R:** Local 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Delhi Hydro Electric Commission, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent in Delhi, save and except assistant superintendents, persons above the rank of assistant superintendent, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	3
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	0

**1983-85-R:** Local 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Nanticoke Hydro Electric Commission, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent in Port Dover, save and except line superintendent and persons above the rank of line superintendent." (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	0

**2344-85-R:** Canadian Union of Public Employees, (Applicant) v. Peterborough Public Library Board, (Respondent).

Unit: "all employees of the respondent in Peterborough, Ontario, regularly employed for not more than twenty (20) hours per week and students employed during the school vacation period, save and except Chief Librarian, Deputy Chief Librarian, Secretary to the Chief Librarian and persons above the rank of Chief Librarian." (46 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	34
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	4



## Applications for Certification Dismissed - No Vote Conducted

**3426-84-R:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Coca-Cola Ltd., (Respondent) v. Group of Employees, (Objectors). (35 employees in unit).

Unit #2: (See: *Bargaining Agents Certified - No Vote Conducted*).

**2196-85-R:** La Fraternite Inter-Provinciale des Ouvriers en Electricite, (Applicant) v. Dustbane Products Limited, (Respondent) v. L.I.U.N.A., Local 527, (Intervener) v. Group of Employees, (Objectors). (109 employees in unit).

**2237-85-R:** International Association of Machinists and Aerospace Workers, (Applicant) v. Westinghouse Canada Inc., (Respondent) v. Group of Employees, (Objectors). (87 employees in unit).

**2295-85-R:** The Sheet Metal Workers' International Association Local Union 397, (Applicant) v. Poli Fiberglass Industries (Thunder Bay) Ltd., (Respondent). (4 employees in unit).

**2297-85-R:** Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. National Grocers Co. Ltd., (Respondent). (2 employees in unit).

**2374-85-R:** United Food and Commercial Workers International Union, AFL-CIO-CLC, (Applicant) v. Quinte Meat Products Ltd., (Respondent). (48 employees in unit).

**2575-85-R:** Hotel Employees & Restaurant Employees Union, Local 75, (Applicant) v. 437832 Ontario Limited, carrying on business as Old Mill Investments, (Respondent). (42 employees in unit).

**2578-85-R:** Independent Canadian Steelworkers Union, (Applicant) v. VS Services Ltd., (Respondent). (18 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

**2591-85-R:** United Food & Commercial Workers Union C.L.C., A.F.L.-C.I.O., (Applicant) v. Designer Classics Carpet Manufacturing Limited, (Respondent). (87 employees in unit).

Unit #1: (See: *Bargaining Agents Certified - No Vote Conducted*).

## Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

**2161-85-R:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. John Deere Welland Works of John Deere Limited, (Respondent).

Unit: "all employees of the respondent in Welland, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, students employed during the school vacation period, students employed through a co-operative training program with a University or Community College." (459 employees in unit).

Number of names of persons on revised voters' list		460
Number of persons who cast ballots	450	
Number of ballots marked in favour of applicant		156
Number of ballots marked against applicant		294

**2284-85-R:** Retail, Wholesale and Dept. Store Union AFL-CIO-CLC, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent).

Unit: “all employees of the respondent licensed as taxi drivers by the City of Gloucester, save and except single plate owners, multi-plate owners, dispatch staff, supervisors, and persons above the rank of supervisor.” (1 employee in unit).

Number of names of persons on list as originally prepared by employer	22
Number of persons who cast ballots	1
Ballots segregated and not counted	1

**2390-85-R:** United Steelworkers of America, (Applicant) v. Duracell Inc., (Respondent).

Unit: “all employees of the respondent in Mississauga save and except supervisors of forepersons, persons above the rank of supervisor or foreperson, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (244 employees in unit).

Number of names of persons on revised voters’ list	192
Number of persons who cast ballots	185
Number of ballots excluding segregated ballots cast by persons whose name appear on voters’ list	179
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	63
Number of ballots marked against applicant	115
Ballots segregated and not counted	6

**Applications for Certification Dismissed Subsequent to a Post-Hearing Vote**

**1934-85-R:** United Steelworkers of America, (Applicant) v. Johnson Matthey Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all office, clerical and technical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, professional engineers, outside sales staff, personnel assistant and secretary to the president, secretary to the vice-president of finance and treasurer and secretary to the manufacturing manager.” (50 employees in unit).

Number of Names of persons on list as originally prepared by employer	52
Number of persons who cast ballots	51
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	28
Ballots segregated and not counted	2

**2168-85-R:** Toronto Printing Pressmen & Assistants’ Union Local No. 10, (Applicant) v. Orchid Label and Printing Co. Ltd., (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week.” (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list	12
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	8

**2291-85-R:** United Steelworkers of America, (Applicant) v. John Crane Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the City of Stoney Creek, save and except supervisors, persons above the rank of supervisor, sales staff, and secretary to the general manager." (46 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	44
Number of ballots marked in favour or applicant	19
Number of ballots marked against applicant	25

**2488-85-R:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Dufferin Produce Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	14
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	10

## APPLICATIONS FOR CERTIFICATION WITHDRAWN

**1294-85-R:** Labourers' International Union of North America, Local 183, (Applicant) v. Concorde Maintenance Limited, (Respondent). (23 employees in unit).

**1775-85-R:** Labourers' International Union of North America, Local 1036, (Applicant) v. Lakeland Pipelines Limited, (Respondent). (12 employees in unit).

**1868-85-R:** Service Employees' Union, Local 210 affiliated with Service Employees' International Union, AFL-CIO-CLC, (Applicant) v. Essex County Automobile Club, (Respondent). (31 employees in unit).

**2666-85-R:** Hotels, Clubs, Restaurants & Taverns Employees' Union - Local 261, (Applicant) v. 547691 Ontario Limited, (Respondent). (2 employees in unit).

**2674-85-R:** United Food and Commercial Workers Union Local 409 Chartered by the United Food and Commercial Workers International Union CLC-AFL-CIO, (Applicant) v. Valhalla Inn, (Respondent). (39 employees in unit).

## APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

**2505-83-R:** Canadian Union of Public Employees, (Applicant) v. Hallmark Housekeeping Services Inc., Med+Experts Inc. and Brantwood Manor Nursing Homes Ltd., (Respondents). (*Granted*).

**0295-85-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents). (*Granted*).

**0329-85-R:** Toronto-Central Ontario Building and Construction Trades Council, on its own behalf and on behalf of its affiliated members, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents). (*Granted*).



**0884-85-R:** International Union, United Plant Guard Workers of America (U.P.G.W.A.) and its Local 1971, (Applicant) v. General Motors of Canada Limited Plant 2 and 3; General Motors of Canada Limited, (Respondents). (*Dismissed*).

**1466-85-R:** United Steelworkers of America, (Applicant) v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Limited, (Respondents). (*Granted*).

**1800-85-R:** United Food & Commercial Workers International Union, Local 409, (Applicant) v. Canada Safeway Limited and Current River Foods, (Respondent). (*Withdrawn*).

**1809-85-R:** International Union of Operating Engineers, Local 793, (Applicant) v. Merison Masonry Limited and Leader Masonry & Forming Limited, (Respondent). (*Withdrawn*).

**1966-85-R:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Romm Construction Co. Ltd. and Selton Engineering Construction Inc., (Respondent). (*Withdrawn*).

## SALE OF A BUSINESS

**2506-83-R:** Canadian Union of Public Employees, (Applicant) v. Hallmark Housekeeping Services Inc. and Med+Experts Inc., (Respondents). (*Dismissed*).

**0295-85-R:** International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents). (*Granted*).

**0328-85-R:** Toronto-Central Ontario Building and Construction Trades Council, on its own behalf and on behalf of its affiliated members, (Applicant) v. West York Construction Limited, and West York Construction (1984) Limited, (Respondents). (*Granted*).

**1292-85-R:** Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, (Applicant) v. 361870 Ontario Limited carrying on business as P & R Concrete and as Ara Concrete Finishing; and Caledonia Concrete Finishing Company Ltd., (Respondents). (*Dismissed*).

## UNION SUCCESSOR RIGHTS

**1960-85-R:** United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Applicant) v. Mechanical Contractors Association of Ontario, (Respondent). (*Granted*).

**2386-85-R:** United Steelworkers of America, (Applicant) v. Prescott-Russell Association for the Mentally Retarded, (Respondent). (*Granted*).

## APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

**1807-85-R:** Mike Tales, et al, (Applicants) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Respondent) v. Canadian Pacific Hotels Limited (Red Oak Inn), (Intervener) v. Group of Employees, (Objectors). (47 employees in unit). (*Dismissed*).

**1949-85-R:** Beryl Watts, (Applicant) v. Canadian Union of Operating Engineers & General Workers Union Local 101, (Respondent) v. Yonge-Eglinton Centre Management Services, (Intervener). (53 employees in unit). (*Granted*).

**2033-85-R:** Jacqueline Spencer, (Applicant) v. International Beverage Dispensers' & Bartenders' Union, Local 280, (Respondent) v. 466364 Ontario Ltd. O/A Maple Leaf Tavern, (Intervener).

Unit: "all full-time and part-time male and female employees employed in the beverage departments in licensed establishments as tapmen, bartenders, beverage waiters, bar boys and improvers." (2 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

**2233-85-R:** Richard Campbell, (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (Respondent) v. H. E. Vannatter Limited, (Intervener).

Unit: "all salaried employees at the employer's Wallaceburg offices at 102 Arnold Street, Wallaceburg, Ontario, save and except managers, supervisors, those above the rank of manager and supervisor, executive secretary to the President and General Manager, payroll and benefits administrator, senior design engineers, purchasing agent, computer operator head, shipper and receiver, sales representatives, time study observers, research and development specialists, budget and cost analysts, methods and EDP analysts, sales co-ordinators, salary personnel accounting clerks, secretaries to Plant Manager level positions and above, secretary to the Treasurer, employees of the Employee Relations Department, quality control analysts, students employed on a university co-operative basis and persons regularly employed for not more than twenty-four (24) hours per week." (6 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	5

**2269-85-R:** Raymond Simser, (Applicant) v. Graphic Communications International Union, Local 500M (Bindery), (Respondent) v. Heritage Press Limited, (Intervener). (1 employee in unit). (*Granted*).

**2519-85-R:** Nelson Pereira, (Applicant) v. United Steelworkers of America, (Respondent). (8 employees in unit). (*Granted*).

## REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

**1993-85-M:** PPG Industries Canada Ltd. London Merchandizing Branch, (Employer) v. Energy and Chemical Workers Union, (Trade Union). (*Dismissed*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

**2370-85-U:** Lachlan McLachlan, (Applicant) v. Local 113, Amalgamated Transit Union and Charles B. Johnson et al, (Respondents). (*Withdrawn*).

## APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

**2057-83-U:** Canadian Union of Public Employees, (Applicant) v. Brantwood Manor Nursing Homes Limited, Herb Hallatt and Marion Hallatt, (Respondents). (*Dismissed*).

## COMPLAINTS OF UNFAIR LABOUR PRACTICE

**1490-83-U:** Maurice Berlinguette, Pat Proulx, Lionel Trudel, Paul Pilon, (Complainants) v. Labourers' International Union of North America, Local 1036, (Respondents). (*Dismissed*).

**2058-83-U:** Canadian union of Public Employees, (Complainant) v. Brantwood Manor Nursing Homes Limited, Herb Hallatt, Marion Hallatt and Med+Experts Inc., (Respondents). (*Granted*).

**0183-84-U:** Lumber and Sawmill Workers' Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Bois A. Lachance Lumber Limited and Roger Lachance, (Respondent). (*Granted*).

**0243-84-U:** Canadian Pneumatic Control Contractors Association, (Complainant) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Mechanical Contractors Association of Ontario, (Respondents). (*Granted*).

**1258-84-U:** Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC, (Complainant) v. Essex County Automobile Club, (Respondent). (*Withdrawn*).

**2269-84-U:** Vincent McManus, (Complainant) v. Canadian Union of Operating Engineers and General Workers, (Respondent). (*Dismissed*).

**2842-84-U:** Dominion Store Employees - Conestoga Mall, Waterloo, Westmount Place, Waterloo, Speedvale Plaza, Guelph, Ermoso Rd., Guelph, (Complainants) v. Mr. C. McCormick - Local 206, U.F.C.W., Mr. C. Evans - Canadian Director, U.F.C.W., Rexdale, United Food and Commercial Workers International Union, Dominion Stores Limited, James B. & E., Morris Family Enterprises Inc., (Mr. Grocer, Waterloo), Zehrs Markets Limited, Willet Foods Ltd., and United Food and Commercial Workers, Local 1977, (Respondents). (*Withdrawn*).

**0765-85-U:** United Electrical, Radio and Machine Workers of Canada (UE), (Complainant) v. Pre Fab Cushioning Products Ltd., (Respondent). (*Dismissed*).

**0926-85-U:** Teamsters Local Union No. 141, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Moffatt & Powell Limited, (Respondent). (*Withdrawn*).

**1004-85-U:** Herbert Thomas Lukings, (Complainant) v. Labatt's Ontario Breweries, Division of Labatt Brewing Company Limited, (Respondent). (*Dismissed*).

**1016-85-U:** Ontario Public Service Employees Union, (Complainant) v. St. Andrew's Centennial Manor, a Division of Swiss Nursing Homes Inc., (Respondent), Group of Employees, (Objectors). (*Dismissed*).

**1239-85-U:** Donald Earhart, (Complainant) v. Jim Caron and United Brotherhood of Carpenters and Joiners of America, local 494, and Tony Rea and Co. Ltd., (Respondent). (*Dismissed*).

**1467-85-U:** United Steelworkers of America, (Complainant) v. Plaza Fiberglas Manufacturing Limited and Plaza Electro-Plating Limited, (Respondents). (*Granted*).



**1745-85-U:** Essex County Automobile Club, (Complainant) v. Service Employees' Union, Local 210, affiliated with Service Employees' International Union, AFL-CIO-CLC Jack Nichols and Kathy Lar-  
oche, (Respondents). (*Withdrawn*).

**1820-85-U:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant  
Employees Union Local 88, (AFL-CIO-CLC), (Complainant) v. O'Tooles Roadhouse Restaurant,  
(Respondent). (*Withdrawn*).

**1821-85-U:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant  
Employees Union Local 88, (AFL-CIO-CLC), (Complainant) v. O'Tooles Roadhouse Restaurant,  
(Respondent). (*Withdrawn*).

**1822-85-U:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant  
Employees Union Local 88, (AFL-CIO-CLC), (Complainant) v. O'Tooles Roadhouse Restaurant,  
(Respondent). (*Withdrawn*).

**1823-85-U:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant  
Employees Union Local 88, (Complainant) v. O'Tooles Roadhouse Restaurant, (Respondent).  
(*Withdrawn*).

**1918-85-U:** West York Construction (1984) Limited, (Complainant) v. International Union of Brick-  
layers and Allied Craftsmen, Local 2, Toronto-Central Ontario Building and Construction Trades Coun-  
cil, Sheriff of the Judicial District of York, C. A. Ballentine and John Robbins, (Respondents).  
(*Withdrawn*).

**1958-85-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers,  
(Complainant) v. Canada Dry Limited, (Respondent). (*Withdrawn*).

**2007-85-U:** London and District Service Workers' Union, Local 220, (Complainant) v. Craigviel Gar-  
dens, (Respondent). (*Withdrawn*).

**2018-85-U:** Service Employees Union, Local 210, (Complainant) v. Essex County Automobile Club,  
(Respondent). (*Withdrawn*).

**2070-85-U:** John D. Lyons, (Complainant) v. Teamsters Local 419, (Respondent) v. Beaver Lumber  
Company Limited, (Intervener). (*Withdrawn*).

**2124-85-U:** United Food and Commercial Workers International Union, Local 1105-P, (Complainant)  
v. Saville Food Products, Inc., (Respondent). (*Withdrawn*).

**2157-85-U:** Labourers International Union of North America, Local 1036, (Complainant) v. Lakelands  
Pipelines Limited, (Respondent). (*Withdrawn*).

**2171-85-U:** Labourers' International Union of North America, Local 183, (Complainant) v. York Con-  
dominium Corporation No. 106, (Respondent). (*Withdrawn*).

**2184-85-U:** Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers,  
(Complainant) v. Canada Dry Limited, (Respondent). (*Withdrawn*).

**2185-85-U:** United Food and Commercial Workers International Union Local 175, (Complainant) v.  
Valdi Inc., (Respondent). (*Withdrawn*).

**2200-85-U:** Canadian Paperworkers' Union, (Complainant) v. Belkin Packaging Ltd., (Respondent). (*Withdrawn*).

**2220-85-U:** Constantine Bassoulos, (Complainant) v. United Steelworkers of America Local 7608, (Respondent). (*Withdrawn*).

**2230-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. G.B.F. Forging Specialists Company, (Respondent). (*Withdrawn*).

**2290-85-U:** Evi Christakis, (Complainant) v. Local 1000A of United Food and Commercial Workers, (Respondent). (*Withdrawn*).

**2294-85-U:** Vincent Maloney, (Complainant) v. United Food and Commercial Workers Union, Local 486, (Respondent). (*Withdrawn*).

**2303-85-U:** Steven Michenko, (Complainant) v. Mediacom, (Respondent), v. Graphic Communications International Union, Local 500-M, (Intervener). (*Withdrawn*).

**2321-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. G.B.F. Forging Specialists Company, (Respondent). (*Withdrawn*).

**2322-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. G.B.F. Forging Specialists Company, (Respondent). (*Withdrawn*).

**2323-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. G.B.F. Forging Specialists Company, (Respondent). (*Withdrawn*).

**2324-85-U:** London and District Service Workers' Union, Local 220 SEIU, AFL, CIO, CLC, (Complainant) v. Aylmer Nursing Home, (Respondent). (*Withdrawn*).

**2341-85-U:** International Brotherhood of Boilermakers, Iron Ship Builders' Blacksmiths, Forgers and Helpers of Lodge 128, (Complainant) v. 3-L Filters Limited, (Respondent). (*Withdrawn*).

**2346-85-U:** Canadian Union of Restaurant and Related Employees Hotel Employees and Restaurant Employees Union Local 88, (Complainant) v. 605452 Ontario Ltd. c.o.b. as O'Tooles Roadhouse Restaurant, (Respondent). (*Withdrawn*).

**2347-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. G.B.F. Forging Specialists Company, (Respondent). (*Withdrawn*).

**2373-85-U:** Hotels, Clubs, Restaurants, Taverns Employees' Union Local 261, (Complainant) v. Tom Landers and Journey's End Motels, (Respondent). (*Withdrawn*).

**2393-85-U:** Ontario Nurses' Association, (Complainant) v. The Regional Municipality of Haldimand Norfolk, (Respondent). (*Withdrawn*).

**2408-85-U:** Robert Gareau, (Complainant) v. Fairway Cartage and Express, (Respondent). (*Withdrawn*).

**2426-85-U:** International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, (Complainant) v. 3-L Filters Limited, (Respondent). (*Withdrawn*).

**2430-85-U:** Sheet Metal Workers' International Association, Local Union 540, (Complainant) v. S.W. Fleming Limited, (Respondent). (*Withdrawn*).

**2432-85-U:** Neville Stoddart, (Complainant) v. International Leather Goods, Plastic & Novelty Workers Union, (Respondent). (*Withdrawn*).

**2433-85-U:** Neville Stoddart, (Complainant) v. Regency Plastic Co., (Respondent). (*Withdrawn*).

**2490-85-U:** Retail, Wholesale and Department Store Union, AFL: CIO: CLC:, (Complainant) v. Grolier Limited, (Respondent). (*Withdrawn*).

**2504-85-U:** International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), (Complainant) v. Alpha-Vico Canada Inc. & Louis A. Berthiaume, (Respondents). (*Granted*).

**2505-85-U:** Domingo Ramos, (Complainant) v. UAW Local 112, (Respondent). (*Withdrawn*).

**2532-85-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Dufferin Produce Co. Ltd., (Respondent). (*Withdrawn*).

**2545-85-U:** Melvin Madden and Stanley Cruwys, (Complainants) v. U.A.W. Local 222 Representatives John Sinclair, Robert Peters, Kenneth Spencer, (Respondents). (*Withdrawn*).

**2550-85-U:** Canadian Union of Operating Engineers and General Workers Local 101, (Complainant) v. Halo of Canada Lighting, Inc., (Respondent). (*Withdrawn*).

**2656-85-U:** Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Cheapes Records and Tapes Ltd., (Respondent). (*Withdrawn*).

**2716-85-U:** Retail, Wholesale and Department Store Union, (Complainant) v. Benjamin Distribution Limited operating as Windsor News, (Respondent). (*Withdrawn*).

**2720-85-U:** London and District Service Workers' Union, Local 220, (Complainant) v. Durham Memorial Hospital, (Respondent). (*Withdrawn*).

**2734-85-U:** James A. Bird, (Complainant) v. Cronkwright Transport, Jim Wood, Teamsters Local 879, (Respondents). (*Withdrawn*).

**2752-85-U:** Retail, Wholesale and Department Store Union, (Complainant) v. Benjamin Distribution Ltd. operating as Windsor News, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR CONSENT TO PROSECUTE

**2377-85-U:** Laurentian University, (Applicant) v. Laurentian University Staff Association et al, (Respondents). (*Withdrawn*).

## APPLICATIONS FOR RELIGIOUS EXEMPTION

**2147-85-M:** Barbara J. Norris, (Applicant) v. Ontario Public Service Employees Union and its Local 454, (Respondent Trade Union) v. the Children's Aid Society of Ottawa-Carleton, (Respondent Employer). (*Dismissed*).



## JURISDICTIONAL DISPUTES

**0392-85-JD:** Merison Masonry Ltd., (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

**0393-85-JD:** Twin Masonry Limited, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

**0592-85-JD:** Labourers' International Union of North America, Local 597 and Labourers' International Union of North America, Ontario Provincial District Council, (Complainant) v. Merison Masonry Limited, (Respondent). (*Withdrawn*).

**0593-85-JD:** Labourers' International Union of North America, Local 597 and Labourers' International Union of North America, Ontario Provincial District Council, (Complainant) v. Twin Masonry Limited, (Respondent). (*Withdrawn*).

**0712-85-JD:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 759, (Complainant) v. Horton CBI, Limited and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, (Respondent). (*Withdrawn*).

**1389-85-JD:** Labourers International Union of North America, Local 527, (Applicant) v. Brikon Masonry Inc., Ontario Conference of Bricklayers, and Local 7, (Respondents). (*Withdrawn*).

**1654-85-JD:** Ellis-Don Limited, (Complainant) v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Respondent). (*Withdrawn*).

## APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

**1115-85-M:** Windsor Newspaper Guild Local 239, (Applicant) v. Windsor Star, (Respondent). (*Withdrawn*).

**1879-85-M:** Dan Therrian, Herbert Black, Ray Dobson, Ray Montgomery, Charlie Rankin, Bob Banks, Kerry Johnson, Sharon Vyse, (Applicants) v. Service Employees Union Local 204, (Respondent). (*Dismissed*).

**2122-85-M:** Office & Professional Employees International Union, Local 263, (Applicant) v. Domtar Inc., (Respondent). (*Granted*).

**2369-85-M:** London and District Service Workers' Union Local 220, (Applicant) v. Aylmer Nursing Home, (Respondent). (*Withdrawn*).

**2599-85-M:** The Wentworth County Board of Education, (Applicant) v. Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

## COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

**2084-85-OH:** Peter C. Buttenaar, (Complainant) v. The Municipality of Metropolitan Toronto, J. Ritchie; L. Lipp; J. Carnduff; K. F. Martelock; J. Horvath; J. Lees; P. Ferguson; F. J. Horgan, (Respondents) v. Canadian Union of Public Employees Local 79, (Intervener). (*Dismissed*).

**2186-85-OH:** David F. Elliott, (Complainant) v. Ministry of Government Services, and Manville Development Corporation, (Respondents). (*Dismissed*).

**2250-85-OH:** Christopher Edward Angel, (Complainant) v. Canada Packers (MTC Pharmaceuticals), (Respondent). (*Withdrawn*).

**2660-85-OH:** Sandra Causley, (Complainant) v. J. V. Wiltshire Ltd., (Respondent). (*Withdrawn*).

## CONSTRUCTION INDUSTRY GRIEVANCES

**2727-84-M:** The Toronto - Central Ontario Building and Construction Trades Council on its own behalf and on behalf of its affiliates et al, (Applicant) v. Lisgar Construction Co., (Respondent). (*Withdrawn*).

**0282-85-M:** International Union of Operating Engineers Local 793, (Applicant) v. Twin Masonry Limited, (Respondent). (*Withdrawn*).

**0283-85-M:** International Union of Operating Engineers Local 793, (Applicant) v. Merison Masonry Ltd., (Respondent). (*Withdrawn*).

**0768-85-M:** Labourers' International Union of North America, Local 527, (Applicant) v. Ferano Construction Limited, (Respondent). (*Withdrawn*).

**0880-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Huron Construction Company Limited, (Respondent). (*Withdrawn*).

**1006-85-M:** the International Brotherhood of Electrical Workers Local Union 120 of the IBEW Construction Council of Ontario, (Applicant) v. D&D Cable Installations Inc., (Respondent) (*Granted*).

**1139-85-M:** the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7 Canada, (Applicant) v. Brikon Masonry Inc., (Respondent). (*Withdrawn*).

**1346-85-M; 1804-85-M:** Labourers' International Union of North America, Local 506, (Applicant) v. Disney Display, (Respondent). (*Dismissed*).

**1477-85-M:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Ellis-Don Limited, (Respondent). (*Withdrawn*).

**1644-85-M:** Labourers' International Union of North America, Local 506, (Applicant) v. West York Construction Ltd. and West York Construction (1984) Ltd., (Respondents). (*Granted*).

**1965-85-M:** United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Romm Construction Co. Ltd. and Selton Engineering Construction Inc., (Respondent). (*Withdrawn*).

**2096-85-M:** The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Vincent Spirito & Sons Ltd., (Respondent). (*Granted*).

**2158-85-M:** Carpenters' District Council of Toronto & Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. The kendl Group Inc., (Respondent). (*Withdrawn*).

**2247-85-M:** Labourers International Union of North America, Local 491, (Applicant) v. Nora Construction Ltd., (Respondent). (*Withdrawn*).

**2425-85-M:** The Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494, (Applicant) v. alexander Painting & Decorating Company, (Respondent). (*Granted*).

**2439-85-M:** Labourers' International Union of North America, Local 1089, (Applicant) v. Teperman and Sons Inc., (Respondent). (*Granted*).

**2456-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Dean Construction Company Limited, (Respondent). (*Withdrawn*).

**2534-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Haynes Gray & Associates Engineering Ltd., (Respondent). (*Withdrawn*).

**2536-85-M:** Labourers' International Union of North America, Local 1036, (Applicant) v. Lundrigans Construction Limited, (Respondent). (*Withdrawn*).

**2543-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Richard's Steel Ltd., (Respondent). (*Withdrawn*).

**2544-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Andy's Excavating Limited, (Respondent). (*Granted*).

**2548-85-M:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800, (Applicant) v. 471177 Ontario Limited carrying on business as S. & E. Mechanical, (Respondent). (*Granted*).

**2562-85-M:** Labourer's International Union of North America, Local 1036, (Applicant) v. Bird Construction Company Limited, (Respondent). (*Withdrawn*).

**2584-85-M:** Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades, Local 200, (Applicant) v. Dieter Meng Ltd., Astrid Meng Ltd., (Respondent). (*Granted*).

**2593-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Erosion Control Gabions Ltd., (Respondent). (*Withdrawn*).

**2607-85-M:** Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Dismissed*).

**2608-85-M:** Carpenters' District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America, on behalf of Local 27, (Applicant) v. Joe Bancheri Carpenters c/o Guy Lucadamo, (Respondent). (*Withdrawn*).

**2610-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Aberdeen Highlands Construction Ltd., (Respondent). (*Withdrawn*).

**2624-85-M:** United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. All-Wood Contracting Limited, (Respondent). (*Withdrawn*).

**2625-85-M:** United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Anthes Equipment Limited, (Respondent). (*Withdrawn*).



**2626-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. Banchini Limited, (Respondent). (*Withdrawn*).

**2638-85-M:** Laborers' International Union of North America, Local 527, (Applicant) v. Loretta Paving Company Limited, (Respondent). (*Granted*).

**2642-85-M:** International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. Traven Painting Limited, Renzo Traven c.o.b. as Renzo Traven Decorating, (Respondents). (*Granted*).

**2670-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Andrew Paving & Engineering Limited, (Respondent). (*Granted*).

**2671-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. C. W. Smith Crane Service Ltd., (Respondent). (*Withdrawn*).

**2676-85-M:** Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council, (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro, (Respondents). (*Withdrawn*).

**2686-85-M:** Resilient Floorworkers Local 2965, (Applicant) v. Big H Construction Ltd., (Respondent). (*Withdrawn*).

**2691-85-M:** International Union of Operating Engineers, Local 793, (Applicant) v. Romano Construction Co. Ltd., (Respondent). (*Granted*).

**2695-85-M:** Millwright Union, Local 1916, (Applicant) v. Dynamic Steel Fabricators Ltd., (Respondent). (*Granted*).

**2703-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Maincrest Contracting Ltd., (Respondent). (*Withdrawn*).

**2704-85-M:** Labourers' International Union of North America, Local 183, (Applicant) v. Bar-Bro Construction Limited, (Respondent). (*Withdrawn*).

**2709-85-M:** Drywall, Acoustic, Lathing and Insulation, Local 675 of the International Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tampa Interior Systems Inc., (Respondent). (*Withdrawn*).

**2714-85-M:** Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Central Drywall and Acoustics Company, (Respondent). (*Granted*).

**2715-85-M:** Operative Plasterers' and Cement Masons' International Association of United States and Canada Local 598, (Applicant) v. Yorkview Concrete Finishing Ltd., (Respondent). (*Withdrawn*).

**2739-85-M:** United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. Linrin Forming Limited, (Respondent). (*Granted*).

**2768-85-M:** The International Brotherhood of Painters and Allied Trades AFL-CIO, (Applicant) v. National Painting and Decorating Corporation, (Respondent). (*Withdrawn*).

**2807-85-M:** United Brotherhood of Carpenters' & Joiners of America, Local Union 27, (Applicant) v. J.D. Caulking Limited, (Respondent). (*Granted*).

## **APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION**

**2778-84-U:** Canadian Union of Public Employees, (Complainant) v. Extendicare Health Services Inc., (Respondent). (*Denied*).















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